No. 83-1784

IN THE

Supreme Court of the United States

October Term, 1983

JOHN R. BALELO, et al.,

Petitioners,

v.

MALCOLM BALDRIGE, Secretary of Commerce of the United States, et al.,

Respondents.

APPENDICES TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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John R. BALELO, Andrew Castagnola, Leo Correia, Manuel S. Jorge, Bryan R. Madruga, Harold Medina, John A. Silva, Ralph F. Silva, Jr., George Sousa, Manuel S. Vargas, Jr., John B. Zolezzi, Jr., Plaintiffs-Appellees,

v.

Malcolm BALDRIGE, Secretary of Commerce of the United States, Richard A. Frank, Administrator, National Oceanic and Atmospheric Administration and Terry Leitzell, Assistant Administrator for Fisheries, National Marine Fisheries Service, Defendants-Appellants,

Environmental Defense Fund, Inc., et al., Intervenors-Defendants-Appellants.*

UNITED STATES of America, Plaintiff,

v.

$50,178.80, THE MONETARY VALUE OF 57 TONS OF TUNA, Defendant,

Gladiator Fishing, Inc., Claimant.**

Nos. 81-5806, 81-5807 and 82-5433.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted En Banc
Sept. 15, 1983.

Decided Jan. 24, 1984.

*Appeal from the United States District Court for the Southern District of California Gordon Thompson, Jr., District Judge, Presiding.

**Appeal from the United States District Court for the Central District of California Laughlin Waters, District Judge, Presiding.

Before BROWNING, SNEED, KENNEDY, ANDERSON, TANG, SCHROEDER, PREGERSON, ALARCON, FERGUSON, NELSON and CANBY, Circuit Judges.

ALARCON, Circuit Judge:

In *Balelo v. Klutznick*, 519 F.Supp. 573 (S.D.Cal.1981), plaintiffs-appellees, who are captains of tuna purse seiners (hereinafter the Captains), instituted this action against defendants-appellants (hereinafter the Secretary) seeking declaratory and injunctive relief.[1] The district court granted a declaratory judgment invalidating subsection (f) of regulation 50 C.F.R. § 216.24 (1981) promulgated by the Secretary of Commerce[2] pursuant to the Marine Mammal Protection Act (hereinafter MMPA), 16 U.S.C. § 1371.

Under the regulation, the Captains are permitted to take porpoise during commercial fishing operations only if they comply with certain conditions.[3] They must allow government observers to board and accompany the vessel on regular fishing trips "for the purpose of research or observing operations." 50 C.F.R. 216.24(f). The regulation further authorizes the collection of data which may be used in MMPA enforcement proceedings. *Id.* The district court ruled that the regulation was unconstitutional only insofar as it permitted the use of observer collected data in MMPA enforcement proceedings.

In *United States v. $50,178.80, the Monetary Value of 57 Tons of Tuna and Gladiator Fishing, Inc.*, Cv. No. 79-4466-LEW (MX)

1. Defendants-appellants include: the Secretary of Commerce; the Administrators of National Oceanic and Atmospheric Administration (NOAA) and National Marine Fisheries Service (NMFS), the Assistant Administrator for Fisheries; the Environmental Defense Fund, Inc.; and the Defenders of Wildlife.

2. The Secretary delegated authority to carry out the provisions of the MMPA to the NOAA Administrator and the Assistant Administrator for Fisheries of the NMFS.

3. *See, e.g.*, 50 C.F.R. § 216.24(a)(1) (1981): which states that:

> No marine mammals may be taken in the course of a commercial fishing operation unless: The taking constitutes an incidental catch . . ., a general permit and certificate(s) of inclusion have been obtained and such taking is not in violation of such permit, certificate(s) and regulation.

Section (c)(2) provides that "[i]n order to receive a certificate of inclusion, the operator shall have satisfactorily completed required training." 50 C.F.R. § 216.25(c)(2) (1981). The certificate of inclusion must be renewed annually.

(C.D.Cal. April 21, 1982), a civil forfeiture proceeding, the district court denied a motion to suppress evidence of observer collected data.

We have taken these matters en banc to consider whether the regulation is valid under the MMPA, and if so, whether it violates the fourth amendment. For the reasons set forth below, we have concluded that: (1) the regulation was authorized under the broad rule-making power delegated by Congress to the Secretary; (2) the regulation is consistent with the policies and objectives of the MMPA; and (3) the regulation falls within the pervasively regulated industry exception to the warrant requirement of the fourth amendment.

FACTUAL AND STATUTORY BACKGROUND

The Captains utilize a method of fishing for yellow-fin tuna which results in the incidental taking[4] of certain species of porpoise. Porpoise tend to swim in association with yellow-fin tuna in the eastern tropical Pacific. The porpoise is larger and more active on the ocean's surface. Thus, the Captains can locate yellow-fin tuna by spotting porpoise. Purse seine nets are then set around schools of porpoises. The tuna swimming beneath them are encircled when the net is closed or "pursed" around them. During this operation, significant numbers of porpoise are injured or drowned. Their carcasses are discarded into the sea. In the two years preceding the enactment of the MMPA in 1972, the incidental taking resulted in more than 600,000 porpoise mortalities. *Committee for Humane Legislation Inc. v. Richardson*, 414 F.Supp. 297, 300 (D.D.C.), *aff'd*, 540 F.2d 1141 (D.C.Cir.1976).

Congress' overriding purpose in enacting the MMPA was the protection of marine mammals. Congress declared the immediate goal of the MMPA to be "that the incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and

4. 50 C.F.R. § 216.3 (1981) provides that:

> "Take" means to harass, hunt, capture, collect, or kill, or attempt to harass, hunt, capture, collect, or kill, any marine mammal, including, without limitation, any of the following: The collection of dead animals, or parts thereof; the restraint or detention of a marine mammal, no matter how temporary; tagging a marine mammal; or the negligent or intentional operation of an aircraft or vessel, or the doing of any other negligent or intentional acts which result in the disturbing or molesting of a marine mammal.

serious injury rate." 16 U.S.C. § 1371(a)(2) (1976-1982). To accomplish this goal, Congress imposed a moratorium on the taking and importing of marine mammals. 16 U.S.C. § 1371(a) (1976-1982). A two-year exemption from the moratorium for the taking of marine mammals incidental to commercial fishing operations was allowed. 16 U.S.C. § 1371(a)(2) (1976), *amended by* 16 U.S.C. § 1371(a)(2) (1982). The legislative history indicates that the exemption was provided "for the refinement of these fishing gear modifications" which industry representatives proffered as a solution to the porpoise mortality problem. *Committee for Humane Legislation*, 414 F.Supp. at 301.[5] In addition, the Act directed the "immediate" undertaking of a research and development program to devise improved fishing methods and gear so as to reduce the incidental taking of marine mammals in connection with commercial fishing. 16 U.S.C. § 1381(a) (1976).

Although the commercial fishing industry was exempted for two years from the moratorium, the incidental taking of mammals during this time was conditioned on industry compliance with section 1381.[6] *See, e.g.*, 16

5. The testimony quoted by the court is that of Captain Joe Medina who reported the results of a new and old tests and asserted that the problem was "licked." *Committee for Humane Legislation, Inc. v. Richardson*, 414 F.Supp. at 301 n. 8 (quoting *Hearings on H.R. 10420 Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries*, 92d Cong., 1st Sess., part 1, at 348 (testimony of Captain Joe Medina)). Thus, "Congressman Pelly . . . proposed a temporary moratorium . . . 'to give the tuna fisheries association an opportunity to develop what they indicate is certainly a solution.'" *Committee for Humane Legislation*, 414 F.Supp. at 301 n. 9 (quoting *Hearing on H.R. 10420, supra*, at 407).

6. 16 U.S.C. § 1381 (1976) provides:

> Commercial fisheries gear development
>
> (a) *Research and development program; report to Congress; authorization of appropriations.*
>
> The Secretary of the department in which the National Oceanic and Atmospheric Administration is operating (hereinafter referred to in this section as the "Secretary") is hereby authorized and directed to immediately undertake a program of research and development for the purpose of devising improved fishing methods and gear so as to reduce to the maximum extent practicable the incidental taking of marine mammals in connection with commercial fishing. At the end of the full twenty-four calendar month period following the date of the enactment of this Act [enacted Oct. 21, 1972], the Secretary shall deliver his report in writing to the Congress with respect to the results of such research and development. For the purposes of this section, there is hereby authorized to be appropriated the sum of $1,000,000 for the fiscal year ending June 30, 1973, and the same amount for the next fiscal year. Funds appropriated for this section shall remain available until expended.

U.S.C. § 1371(a)(2) (1976), *amended by* 16 U.S.C. § 1371(a)(2) (1982). Subsection (d) of section 1381 requires the industry to allow agents of the Secretary "to board and to accompany any commercial fishing vessel . . . on a regular fishing trip for the purpose of conducting research or observing operations in regard to the development of improved fishing methods and gear as authorized by this section." 16 U.S.C. § 1381(d) (1976-1982). Since expiration of this two-year exemption in 1974, the taking of marine mammals incidental to commercial fishing must be pursuant to a permit issued by the Secretary, 16 U.S.C. § 1371(a)(2), "subject to regulations prescribed by the Secretary in accordance with section 1373." 16 U.S.C. § 1371(a)(2) (1976-1982).

Section 1373 requires the Secretary to consider, in promulgating the regulations, the "existing and future levels of marine mammal species and population stocks," 16 U.S.C. § 1373(b)(1) (1976-1982), and the "marine ecosystem and related environmental considerations," 16 U.S.C. § 1373(b)(3) (1976-1982). The regulations may also restrict the taking of porpoise by species, number, age, sex, or other factors. 16 U.S.C. § 1373(c) (1976-1982). In addition to the rule-making authority conferred upon the Secretary, 16 U.S.C. § 1373, the MMPA provides for

> (b) *Reduction of level of taking of marine mammals incidental to commercial fishing operations.*
> The Secretary, after consultation with the Marine Mammal Commission, is authorized and directed to issue, as soon as practicable, such regulations, covering the twenty-four-month period referred to in section [1371] of this title as he deems necessary or advisable, to reduce to the lowest practicable level the taking of marine mammals incidental to commercial fishing operations. Such regulations shall be adopted pursuant to section 553 of title 5, United States Code. In issuing such regulations, the Secretary shall take into account the results of any scientific research under subsection (a) of this section and, in each case, shall provide a reasonable time not exceeding four months for the persons affected to implement such regulations.
>
> * * * * * *
>
> (d) *Research and observation.*
> Furthermore, after timely notice and during the period of research provided in this section, duly authorized agents of the Secretary are hereby empowered to board and to accompany any commercial fishing vessel documented under the laws of the United States, there being space available, on a regular fishing trip for the purpose of conducting research or observing operations in regard to the development of improved fishing methods and gear as authorized by this section. Such research and observation shall be carried out in such manner as to minimize interference with fishing operations. The Secretary shall provide for the cost of quartering and maintaining such agents. No master, operator, or owner of such a vessel shall impair or in any way interfere with the research or observation being carried out by agents of the Secretary pursuant to this section.

the imposition of civil and criminal penalties for violations of the provisions of the Act or the regulations or permits issued thereunder. 16 U.S.C. § 1375(a) (1982).

In 1974, the Secretary promulgated a regulation, 50 C.F.R. § 216.24(f) (1974), in language virtually identical to that set forth in section 1381,[7] the statutory observer program, that required the placement of observers on vessels.

Pursuant to the powers granted under the MMPA, the Secretary promulgated the regulation at issue here. The challenged regulation, effective January 1, 1981, requires as a condition of engaging in fishing operations that vessel owners:

> (1) . . . [S]hall, upon the proper notification by the [NMFS], allow an observer duly authorized by the secretary to accompany the vessel on any or all regular fishing trips for the purpose of conducting research and observing operations, *including collecting information which may be used in civil or criminal penalty proceedings, forfeiture actions, or permit or certificate sanctions.*
>
> * * * * * *
>
> (4) The Secretary shall provide for the payment of all reasonable costs directly related to the quartering and maintaining of such observers on board such vessels. A vessel certificate holder who has been notified that the vessel is required to carry an observer, via certified letter from the National Marine Fisheries Service, shall notify the office from which the letter was received at least five days in advance of the fishing voyage to facilitate observer placement. *A vessel certificate holder who has failed to comply with the provisions of this section may not engage in fishing operations for which a general permit is required.*

50 C.F.R. § 216.24(f) (1981) (emphasis added).[8]

7. 50 C.F.R. § 216.14(f) (1974), *amended by* 50 C.F.R. § 216.14(f) (1981) provides in part:

> Any duly authorized agents of the Secretary may from time to time, after timely oral or written notice to the vessel owner . . ., board and/or accompany commercial fishing vessels . . . on regular fishing trips, for the purpose of conducting research or observing operations . . . .

To compare the text of section 1381(d), the statutory observer program, *see* note 6 *supra*.

8. Subsections (2) and (3) and section (g) provide:

> (2) Research and observation duties shall be carried out in such a manner as to minimize interference with commercial fishing operations. The navigator shall

The Captains appear to have no objection to the observers' scientific role on board ship. Their objection is directed solely at those provisions of the 1981 regulation which authorize the use of observer collected data in enforcement proceedings. In the Captain's opening brief we are told that: "The District Court's injunction properly stripped the observer program of its unauthorized and impermissible *search* function and restored it to its pristine role of pure scientific fact-gathering." Appellees' opening brief at 9 (emphasis added).

IMPLIED CONGRESSIONAL AUTHORIZATION

[1] The first issue we must address is whether the 1981 regulation is authorized by the rule-making power delegated by Congress to the Secretary. *See FCC v. Schreiber*, 381 U.S. 279, 290, 291, 85 S.Ct. 1459, 1467, 1468, 14 L.Ed.2d 383 (1965) (Court first addressed whether regulation promulgated by agency was authorized by statute); *Haig v. Agee*, 453 U.S. 280, 101 S.Ct. 2766, 69 L.Ed.2d 640 (1981) (same).

The Captains argue that the regulation prescribing the observer program is invalid because it was not expressly authorized by Congress. The Captains contend that the observer program is a constitutionally ques-

> provide true vessel locations by latitude and longitude, accurate to the nearest minute, upon request by the observer. No owner, master, operator, or crew member of a certified vessel shall impair or in any way interfere with the research or observations being carried out.
>
> (3) Marine mammals killed during fishing operations which are accessible to crewmen and requested from the certificate holder or master by the observer shall be brought aboard the vessel and retained for biological processing, until released by the observer for return to the ocean. Whole marine mammals designated as biological specimens by the observer shall be retained in cold storage aboard the vessel until retrieved by authorized personnel of the National Marine Fisheries Service when the vessel returns to port for unloading.
>
> * * * * * *
>
> (g) *Penalties and rewards:* Any person or vessel subject to the jurisdiction of the United States shall be subject to the penalties provided for under the Act for the conduct of fishing operations in violation of these regulations. The Secretary shall recommend to the Secretary of the Treasury that an amount equal to one-half of the fine incurred but not to exceed $2,500 be paid to any person who furnishes information which leads to a conviction for a violation of these regulations. Any officer, employee, or designated agent of the United States or of any State or local government who furnishes information or renders service in the performance of his official duties shall not be eligible for payment under this section.
>
> 50 C.F.R. § 216.24(f), (g) (1981).

tionable method of enforcing regulatory schemes and that under *Greene v. McElroy*, 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959) authorization for such a rule cannot be found absent an explicit congressional grant. *Greene* does not stand for the proposition that Congress must expressly authorize any action which might be challenged on constitutional grounds. Rather, the case indicates that Congress will not be presumed to have authorized agency methods which depart radically from accepted norms. In the matter before us, we are being asked to decide whether a particular warrantless search is authorized by Congress and whether that search violates the fourth amendment. Merely because some warrantless searches may violate the fourth amendment it does not follow that no warrantless search may be undertaken pursuant to federal law absent express congressional authorization. Unlike the types of procedures at issue in *Greene*, certain types of warrantless searches have traditionally been recognized as constitutionally valid. *See Henderson v. United States*, 390 F.2d 805 (9th Cir.1967) (border searches); *United States v. Robinson*, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973) (search incident to arrest); *South Dakota v. Opperman*, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976) (inventory searches); *Warden v. Hayden*, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967) (exigent circumstances); *Donovan v. Dewey*, 452 U.S. 594, 101 S.Ct. 2534, 69 L.Ed.2d 262 (1981) (regulated industry searches). Nothing in *Greene* prohibits us from determining whether Congress implicitly authorized the observer program. In our discussions below, we reject the contentions that the observer program substantially departs from accepted methods of enforcing regulatory schemes, and the *Greene* case is therefore inapplicable.

To determine whether the regulation was authorized by Congress, we must analyze the language of the statute. *Haig v. Agee*, 453 U.S. 280, 289-90, 101 S.Ct. 2766, 2773, 69 L.Ed.2d 640 (1981). Section 1371 of the MMPA provides in pertinent part:

> There shall be a moratorium on the taking and importation of marine mammals. . . . Marine mammals may be taken incidentally in the course of commercial fishing operations and permits may be issued therefor under section 1374 . . . subject to regulations prescribed by the Secretary in accordance with section 1373. . . . The Secretary . . . is authorized and directed . . . to determine when, *to what extent, if at all, and by what means, it is compatible with this chapter to waive the requirements of this section so as to allow taking, or importing of any marine mammal*, . . . and to adopt suitable regulations, issue permits, and make determinations . . . permitting and governing such taking

and importing. . . .
16 U.S.C. § 1371 (1976-1982) (emphasis added).

Section 1373 provides that the Secretary "shall prescribe such regulations with respect to the taking . . . as he deems *necessary and appropriate to insure* that such taking will not be to the disadvantage of those species . . . and will be consistent with the purposes and policies set forth in section 1361." 16 U.S.C. § 1373(a) (1976-1982) (emphasis added). The Secretary is required to report to Congress every twelve months on the status of the species and "to describe those actions taken and those measures believed necessary, including where appropriate, the issuance of permits . . . to assure the well being of such marine mammals." 16 U.S.C. § 1373(f).

Section 1374 provides that the Secretary may issue permits and that he "shall prescribe such procedures *as are necessary to carry out this section*." 16 U.S.C. § 1374(d)(1) (emphasis added). In addition, the applicant for any permit "*must demonstrate to the Secretary that the taking* . . . under *such permit will be consistent with the purposes of this Chapter . . . and the applicable regulations established under section* [1373]." *Id.* at § 1374 (emphasis added). The Secretary may issue general permits for the "taking of marine mammals" together with regulations to cover the use of such permits which are "[c]onsistent with the regulations prescribed pursuant to section 1373 . . . and the requirements of section 1371." 16 U.S.C. § 1374(h).

It is quite true that the MMPA does not expressly confer upon the Secretary a power to impose, as a condition of obtaining a permit, the stationing of an observer on a vessel. In our view, however, that power is implicit in the broad rule-making authority expressly delegated to the Secretary. *See Haig v. Agee*, 453 U.S. at 291, 101 S.Ct. at 2773-2774 (Secretary of State's power to revoke passports is implicit in broad rule-making authority conferred upon the Secretary by the Passport Act).

The Supreme Court has admonished that even though a statute does not explicitly delegate a specific action, "particularly in light of the 'broad rule-making authority granted' . . . a consistent administrative construction of that statute must be followed by the courts '"unless there are compelling indications that it is wrong"' . . . ." *Haig v. Agee*, 453 U.S. at 291, 101 S.Ct. at 2774. (citations omitted.) Accordingly, the specific content of the regulation need not be expressly authorized. The regulation is proper so long as it conforms to the fundamental objective

of the Act, rationally complements its remedial scheme, *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 11, 12, 100 S.Ct. 883, 890, 891, 63 L.Ed.2d 154 (1980), and "the policy [thereby] announced . . . is 'sufficiently substantial and consistent' to compel the conclusion that Congress approved it." *Haig*, 453 U.S. at 307, 101 S.Ct. at 2782 (quoting *Zemel v. Rusk*, 381 U.S. 1, 12, 85 S.Ct. 1271, 1279, 14 L.Ed.2d 179 (1965)). *Accord Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 369, 93 S.Ct. 1652, 1660-61, 36 L.Ed.2d 318 (1973); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 177, 88 S.Ct. 1994, 2005, 20 L.Ed.2d 1001 (1968) ("We may not in the absence of compelling evidence that such was not Congress' intention . . . prohibit administrative action imperative for achievement of an agency's ultimate purposes."). (citation omitted); *American Trucking Ass'n v. United States*, 344 U.S. 298, 310, 73 S.Ct. 307, 314-15, 97 L.Ed. 337 (1953) (Congress creates regulatory agencies so that they will bring to their work the expert's familiarity with industry conditions that delegating legislatures cannot be expected to possess).

In *Mourning*, the Supreme Court upheld the power of the Federal Reserve Board to promulgate regulation "Z" pursuant to the Board's broad rule-making authority under the Truth and Lending Act. 15 U.S.C. § 1604. The Court emphasized that:

> Where the empowering provision of a statute states simply that the agency may "make . . . such rules and regulations as may be necessary to carry out the provisions of this Act," . . . a regulation promulgated thereunder will be sustained so long as it is "reasonably related to the purposes of the enabling legislation."

411 U.S. at 369, 93 S.Ct. at 1660-1661. (citations omitted).

It appears to us that the regulation at issue here is consistent with the objective and directives of the MMPA. Requiring the Captains to consent to the placement of observers on their vessels as a condition of obtaining a fishing permit is reasonably related to the purposes of the enabling legislation. The paramount purpose of the Act is "the protection and conservation of marine mammals." 16 U.S.C. § 1371.[9] As the D.C.

9. In its Delcaration of Policy, Congress stated:

> [T]hat the protection and conservation of marine mammals is therefore necessary . . . . Marine mammals have proven themselves to be resources of great international significance, esthetic and recreational as well as economic, and it is the sense of the Congress that they should be protected and encouraged to develop to the greatest extent feasible commensurate with sound policies of resource management and that the primary objective of their management should be to maintain the health and stability of the marine ecosystem. Whenever consistent with this

Circuit has observed, the MMPA is to be administered "for the benefit of protected species, rather than for the benefit of commercial exploitation." *Committee for Humane Legislation*, 540 F.2d at 1148.

Effective implementation of the MMPA would be impossible without the use of observers for enforcement purposes. Under the MMPA, any incidental taking of marine mammals must be pursuant to a permit issued by the Secretary. 16 U.S.C. § 1371. The permits must specify such factors as the number, kind, age, sex, and location of the mammals to be taken. 16 U.S.C. § 1374(b). Such limitations are necessary to assure that the MMPA's goal of reducing marine mammal mortality to the minimum practical is met.

The affidavit offered by the government on its motion for summary judgment discloses that the use of on-board observers is the only practicable method of enforcing the limitations in MMPA permits. The tuna vessels subject to the Secretary's regulation operate over thousands of square miles of open ocean for months at a time. No independent surveillance program could hope to be able to verify whether or not a particular vessel complied with its trip quota. Even if such a technically feasible surveillance program were available, its costs would be prohibitive. The observer program is thus "necessary and appropriate to insure that such taking will not be to the disadvantage of those species . . . and will be consistent with the purposes and policies set forth in the [MMPA]." 16 U.S.C. § 1373(a). Because the observer program is necessary for the enforcement of the MMPA, it is within the authority granted to the Secretary by Congress. *See Southwestern Cable*, 392 U.S. 157, 88 S.Ct. 1994, 20 L.Ed.2d 1001 (authority normally presumed for regulations necessary to enforce its statutory mandate); *cf. Mourning*, 411 U.S. at 371-72, 93 S.Ct. at 1662 ("That some other remedial provision might be preferable is irrelevant. We have consistently held that where reasonable minds may differ as to which of several remedial measures should be chosen, courts should defer to the informed experience and judgment of the agency to whom Congress delegated appropriate authority."). In addition, the Secretary could not fulfill his duty under the MMPA to make annual reports to Congress if the observer program were discontinued. *See* 16 U.S.C. § 1373(f); *cf. FCC v. Schreiber*, 381 U.S. at 294, 85 S.Ct. at 1469-1470 (rule promulgated by

primary objective, it should be the goal to obtain an optimum sustainable population keeping in mind the optimum carrying capacity of the habitat.

16 U.S.C. § 1361 (1976-1982).

FCC necessary to execute its duty to make annual reports to Congress).

In upholding the regulation, we are impressed by the fact that Congress, through oversight hearings, was made aware of the continued existence of the observer program. Congress was informed through hearings conducted from 1976 to 1981 that information gathered by observers might be used in penalty proceedings.[10] In 1981, Congress amended the MMPA and did not disturb the Secretary's broad-rule making authority in spite of this regulation.[11] *See Haig v. Agee*, 453 U.S. at 301 & n. 50, 101 S.Ct. at 2779 & N. 50 (quoting *Zemel v. Rusk*, 381 U.S. at 21, 85 S.Ct. at 1283 (fact that Congress left rule-making authority untouched while amending Act gives rise to presumption that Congress has adopted

10. *See, e.g., Hearings on Tuna-Porpoise Amendments Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine Fisheries*, 94th Cong., 2d Sess., Ser. 29 (1976) at 352-53 (government compliance plan to court's order in *Committee for Humane Legislation, Inc. v. Richardson*, 414 F.Supp. 297 (D.D.c.) *aff'd*, 540 F.2d 1141 (D.C.Cir.1976)); *Hearings on Oversight of the Tuna-Porpoise Problem Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 94th Cong., 2d Sess., Ser. 45 (1976) at 212 (remarks of Dr. White); *id.* at 223-24, 262 (remarks of Dr. Fox); *Hearings on Reducing Porpoise Mortality Before the House Comm. on Merchant Marine and Fisheries*, 95th Cong., 1st Sess. 3 (1977) at 209-10, 213, 216-17 (remarks of Dr. White); *Hearings of Tuna-Porpoise Oversight Before the House Comm. on Merchant Marine and Fisheries*, at 463 (remarks of Mr. Bonker); *id.* at 465-66 (remarks of Mr. McCloskey); *Hearings on Oversight into the Marine Mammal Protection Act Before the Senate Comm. on Commerce, Science, and Transportation*, 95th Cong., 1st Sess., Ser. 12 at 17 (1977) (remarks of Dr. White); *Hearings on Marine Mammal Protection Act Authorization Before Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 97th Cong., 1st Sess., Ser. 8 at 81-82 (1981) (remarks of Mr. Breaux and Mr. Burney); *id.* at 83-86 (remarks of Mr. Hertel and Mr. Burney).

11. *See* Pub.L. No. 97-58, 95 Stat. 979, *codified at* 16 U.S.C. § 1371(a)(2) (1982).

As one official explained, the observers started gathering compliance data in 1976. *Hearings on Reducing Porpoise Mortality and Tuna-Porpoise Oversight Before the Subcomm. on Fisheries and Wildlife Conservation and teh Environment of the Comm. on Merchant Marine and Fisheries*, 95th Cong., 1st Sess. 465-66 (1977). The government compliance plan submitted in accordance with the order in *Committee for Humane Legislation, Inc. v. Richardson*, 540 F.2d 1141 (D.C.Cir.1976), was also the subject of 1977 oversight hearings, *e.g., Hearings on Marine Mammal Oversight Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the Comm. on Merchant Marine and Fisheries*, 95th Cong., 1st Sess. 20-21 (1977) (use of observers to collect information on compliance is more effective than aircraft surveillance).

the construction)). Thus, as in *Haig v. Agee*, "the inference of congressional approval 'is supported by more than mere congressional inaction.'" 453 U.S. at 301, 101 S.Ct. at 2779. (quoting *Zemel v. Rusk*, 381 U.S. 1, 11-12, 85 S.Ct. 1271, 1283, 14 L.Ed.2d 179 (1965)); *cf. Fredericks v. Kreps*, 578 F.2d 555, 563 (5th Cir.1978) (en banc) (congressional oversight committee's awareness of regulations before they were put into effect reinforces determination that regulation is consistent with Congress' intent). *See also Andrus v. Allard*, 444 U.S. 51, 57, 100 S.Ct. 318, 322, 62 L.Ed.2d 210 (1979) (Court upheld regulation noting that Congress twice reviewed and amended the Act without rejecting the Department's view that it was authorized under the Eagle Protection Act, 16 U.S.C. § 688, to bar sale of preexisting artifacts); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274-75, 94 S.Ct. 1757, 1761-62, 40 L.Ed.2d 134 (1974) (great weight may be accorded a long standing interpretation of a statute by an agency charged with its administration especially where Congress has reenacted the statute without pertinent change; failure to repeal or revise the agency's interpretation is persuasive evidence that Congress intended the interpretation).

[2] The Captains advance two arguments against this construction. The first is that since Congress explicitly authorized funds for an observer program for only two years, 16 U.S.C. § 1381, the Secretary's regulation adopting an observer program beyond this two-year period exceeds statutory authority. As noted earlier, the legislative history suggests, and the statute itself reflects, that this program was adopted to enable the Secretary to observe the industry's utilization of advanced gear which purportedly would protect marine mammals.[12] Moreover, the program was a *condition* to the industry's incidental taking of porpoise during the *exemption* from the moratorium. 16 U.S.C. § 1371(a)(2) (1976), *amended by* 16 U.S.C. § 1371 (1982). Thereafter, the *Secretary* was authorized to waive the moratorium pursuant to regulations he deemed necessary and appropriate. *Id.*; 16 U.S.C. § 1373. Certainly, if Congress deemed the observer program a necessary condition to allowing the industry an exemption from the moratorium to ensure the protection of marine mammals, it is not unreasonable for the Secretary, in waiving the moratorium, to so condition the issuance of a permit for commercial fishing. The fact that funding for the statutory program was authorized by Congress only during the industry's two-year exemption does not indicate to us that Congress intended to *ban* the use of observer programs.

12. *See* note 6 *supra*.

Further, the expiration of the statutory observer program and the termination of the industry's exemption from the moratorium on takings imposed by the MMPA coincided with the commencement of the rulemaking authority delegated to the Secretary. 16 U.S.C. § 1371(a)(2) (1976), *amended by* 16 U.S.C. § 1371(a)(2) (1982). This suggests that Congress meant what the MMPA clearly states: The *Secretary* would have the broad authority to "determine when, to what extent, *if at all, and by what means*, it is compatable with . . . [the MMPA] to allow taking . . . of any marine mammal, . . . and to adopt suitable regulations, issue permits, and make determinations . . . permitting and governing such taking." 16 U.S.C. § 1371(a)(3)(A) (1976-1982) (emphasis added).

We believe that section 1381 of the MMPA, which expressly included an observer program, provided the Secretary with a model of Congress' view as to what was necessary to carry out the purposes of the statute.

[3] The Captains' second argument is that since the House approved a bill in May of 1977[13] that explicitly authorized the use of observer data for enforcement purposes, but the Senate did not act upon it, congressional *disapproval* must be inferred. The House Oversight Committee, however, was well aware of the continued existence of the observer program and the fact that the Senate might not act on the bill.[14] The Committee was informed that existing funds were not adequate to staff all such vessels. Committee members expressed concern that the bill, which would have authorized additional funding for the observer program to staff all vessels with a capacity of four hundred or more tons,[15] might not be acted upon by Congress. This concern stemmed from the discrepancy in numbers of porpoise mortalities reported by observed and unobserved vessels and the belief that the observer program was the only means of

13. H.R. 6970 would have amended 16 U.S.C. § 1381 to provide that an observer program for 400 ton capacity vessels should be established and maintained. The observer's responsibilities would have included determining compliance with MMPA regulations.

14. *Hearings on Reducing Porpoise Mortality and Tuna-Porpoise Oversight Before Subcomm. on Fisheries and Wildlife Conservation and the Environment of the Comm. on Merchant Marine and Fisheries*, 95th Cong., 1st Sess., 455-56, 463, 465-66 (1977) (remarks of Dr. Fox and Mr. Frank).

15. *Id.* at 4631 (colloquy between Congressman Bonker and Mr. Frank, the NOAA administrator).

obtaining accurate information.[16] We have found nothing in the 1977 or 1978 hearings of the Oversight Committee that suggests that the Committee disapproved of the collection of compliance data. When Congress amended the MMPA in 1981, it did nothing to alter the [*sic*] Secretary's power to continue the existence of the observer program. Thus, we conclude that the mere failure of the bill to be enacted does not demonstrate congressional disapproval of the observer program. *Cf. American Trucking Association v. U.S.*, 344 U.S. 298, 309 n. 10, 73 S.Ct. 307, 314 n. 10, 97 L.Ed. 337 (1952) (fact that Act as originally drafted defined commerce to include leasing but lease terminology was stricken was of no consequence to Interstate Commerce Commission's implied power to regulate leasing practices).

The Captains also contend that the observer program exceeds the Secretary's rule-making authority under the MMPA because section 1377 narrowly defines the acceptable enforcement procedures. The observer program is said to be in direct conflict with section 1377, which allows warrantless searches if there exists reasonable cause to believe a vessel is in violation of the MMPA. We disagree.

Section 1377 provides that "the Secretary shall enforce the provisions" of the MMPA, 16 U.S.C. § 1377(a). The statute provides further that its provisions concerning enforcement by arrest, search and seizure, are "in addition to any other authority conferred by law[.]" 16 U.S.C. § 1377(d). Thus, section 1377 does not limit enforcement procedures to those expressly authorized in that section. The regulation prescribing the observer program comes within the meaning of "other authority conferred by law" as used in section 1377.

CONSTITUTIONALITY OF THE REGULATION

The Captains contend that the regulation authorizes a warrantless search in violation of the fourth amendment.

[4] Whether the observer program constitutes a search is a question which is not free from doubt. This circuit has held that not every boarding of a vessel constitutes a search. *United States v. Olander*, 584 F.2d 876, 888 (9th Cir.1978) (boarding to serve process is not a search), *vacated on other grounds sub nom. Harrington v. United States*, 443

16. *Id.*

U.S. 914, 99 S.Ct. 3104, 61 L.Ed.2d 878 (1979). A search within the meaning of the fourth amendment involves governmental prying into hidden places for that which is concealed by persons exhibiting a "legitimate expectation of privacy." *See Rakas v. Illinois*, 439 U.S. 128, 143, 99 S.Ct. 421, 430, 58 L.Ed.2d 387 (1978). The regulation does not authorize an inspection of private papers, nor a search of the person, or the personal effects of the Captains or their crews. Instead, the observers must confine their observations to the fishing operations of the vessel, which occur on the open sea or on deck. Thus, the information they may gather is restricted to evidence which is in plain view. "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz v. United States*, 389 U.S. 347 at 351, 88 S.Ct. 507 at 511, 19 L.Ed.2d 576 (1967). *See United States v. Whitmire*, 595 F.2d 1303, 1312 (5th Cir.1979), (high levels of privacy might be accorded to crews living quarters on tanker that travels for months, but no crew member has legitimate claim of privacy on open deck of a fishing smack or in the hold of a cargo vessel available for hire), *cert. denied*, 448 U.S. 906, 100 S.Ct. 3048, 65 L.Ed.2d 1136 (1980).

It can be argued with equal force, however, that the observer's constant surveillance of the activities of the Captains and their crews, for a prolonged period of time, constitutes an intrusion into liberty and privacy interests, protected by the fourth amendment, by exposing "what [a person] seeks to preserve as private, even in an area accessible to the public." *Katz*, 389 U.S. at 351, 88 S.Ct. at 511.

[5] We need not pause to resolve this nice question. Even if we assume that the regulation authorizes a warrantless *search* of the operations of a fishing vessel, it is our view that the regulation requiring the presence of observers on purse seiners does not violate the fourth amendment.

The fourth amendment prohibits *un*reasonable searches and seizures. Warrantless searches may be reasonable under certain circumstances. *See, e.g., Weeks v. United States*, 232 U.S. 383, 392, 34 S.Ct. 341, 344, 58 L.Ed. 652 (1914) (search incident to a lawful arrest); *Carroll v. United States*, 267 U.S. 132, 146, 45 S.Ct. 280, 282-83, 69 L.Ed. 543 (1925) (search of vehicles based on probable cause that contraband is being carried); *South Dakota v. Opperman*, 428 U.S. 364, 367-76, 96 S.Ct. 3092, 3096-3101, 49 L.Ed.2d 1000 (1976) (inventory search of impounded vehicles without a showing of probable cause); *Illinois v. LaFayette*, ___ U.S. ___, ___, 103 S.Ct. 2605, 2611, 77 L.Ed.2d 65 (1983) (booking search of a man's purse-type shoulder bag); *United States v. Villamonte-*

Marquez, ____ U.S. ____, ____, 103 S.Ct. 2573, 2582, 77 L.Ed.2d 22 (1983) (boarding of vessels without articulable suspicion). In *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1924), the Supreme Court commented: "Under the common law and agreeably to the Constitution [a] search may in many cases be legally made without a warrant. The Constitution does not forbid search, as some parties contend, but it does forbid unreasonable search." 267 U.S. at 146, 45 S.Ct. at 282.

The Supreme Court has recognized that warrantless searches in closely regulated industries can be reasonable. The Court has held that warrantless inspections are reasonable if they are reasonably necessary to further important federal interests and the federal regulatory presence is sufficiently comprehensive and predictable that "the assurance of regularity provided by a warrant is rendered unnecessary." *Donovan v. Dewey*, 452 U.S. 594, 599-602, 101 S.Ct. 2534, 2538-40, 69 L.Ed.2d 262 (1981)." The Court has applied the exception where the business premises searched are part of an industry "long subject to close supervision and inspection." *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 76-77, 90 S.Ct. 774, 776-77, 25 L.Ed.2d 60 (1970); *see also United States v. Raub*, 637 F.2d 1205, 1208 (9th Cir.1980) ("One of the recognized exceptions to the warrant requirement is for administrative searches of enterprises that traditionally have been closely regulated."). In *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313, 98 S.Ct. 1816, 1820-21, 56 L.Ed.2d 305 (1978), the Court observed that certain industries have had such a history of close governmental supervision that no reasonable proprietor entering into them could have a justifiable expectation of privacy. In *United States v. Biswell*, 406 U.S. 311, 92 S.Ct. 1593, 32 L.Ed.2d 87 (1972), the Court extended the pervasively regulated industry exception to industries without a long tradition of regulation where frequent unannounced inspections are essential to further an important governmental interest.

Where the regulation involves a comprehensive and predictable governmental presence, the owner "is not left to wonder about the

17. As noted earlier, we have concluded that the observer program furthers substantial federal interests in protecting marine mammals. Congress was aware that an important national asset was being depleted by the commercial tuna fishing industry. Congress also determined that the Secretary needed broad rule-making power to adopt measures consistent with the MMPA to remedy the problem. The Secretary reasonably concluded that the observer program was necessary to further the regulatory scheme presented under the MMPA.

purposes of the inspector or the limits of his task." 406 U.S. at 316, 92 S.Ct. at 1596. The Court has also noted that where the industry is closely regulated, the owner cannot help but be aware that the government will conduct periodic inspections for specific purposes. *Donovan v. Dewey*, 452 U.S. 594, 600, 101 S.Ct. 2534, 2538-39, 69 L.Ed.2d 262 (1981). The reasonableness of a search in a closely regulated industry does not depend on the existence of probable cause but rather on the "pervasiveness and regularity of the federal regulations." 452 U.S. at 606, 101 S.Ct. at 2542. When a person chooses to engage in a closely regulated industry and to accept a license which is conditioned upon such warrantless intrusion and inspection, he does so with full knowledge of the restrictions on his privacy. He is also fee not to submit to such regulation and warrantless inspection by declining to seek a federal permit. *Biswell*, 406 U.S. at 315-16, 92 S.Ct. at 1596.

The Captains argue that the closely regulated industry exception does not apply to a warrantless administrative search unless it is expressly authorized by Congress. This argument was presented and rejected by the court in *United States v. Rucinski*, 658 F.2d 741 (10th Cir.1981), *cert. denied*, 455 U.S. 939, 102 S.Ct. 1430, 71 L.Ed.2d 649 (1982). It is quite true that in each of the cases cited above where the Supreme Court determined that a warrantless search of a closely regulated industry was reasonable under the fourth amendment, the entry was expressly authorized by statute. The Captains assume that since the Supreme Court has held that a warrantless search of a closely regulated industry is reasonable when expressly authorized by Congress, the search of such a business violates the fourth amendment if it is conducted pursuant to a regulation *impliedly* authorized by Congress. No authority is cited for this novel constitutional proposition. The law is to the contrary. Congress cannot authorize conduct which violates the fourth amendment. The proper inquiry when a warrantless search is challenged is whether it is authorized by the fourth amendment—not by an act of Congress.

In *Raub*, this court noted that "[c]ommercial fishing has a long history of being a closely regulated industry." 637 F.2d at 1208 (footnote omitted). Regulation of the fishing industry began in 1793. *Id.* at 1209 n. 5. Since 1972, the tuna industry has been closely regulated by Congress because its fishing operations threatened the extinction of the porpoise. Congress' interest in the protection of marine mammals was made known to all commercial fishermen in 1972 when Congress expressly authorized the placing of observers on purse seiners to protect the porpoise under the MMPA. As discussed above, in the MMPA, Congress

authorized the Secretary to prescribe regulations and to issue a permit restricting the taking of marine mammals. Congress also authorized the Secretary to limit the issuance of permits to those persons who can demonstrate that any taking of marine mammals will be consistent with the MMPA, 16 U.S.C. § 1373. Thus, commercial fishermen have been made aware since 1972 that to take porpoise they must have a permit which is subject to conditions that will insure that marine mammals are given the protection required by Congress. The statutory observer program had been one such condition. Since 1974 commercial fishermen have also been aware of the regulation which prescribes the observer program. Any tuna boat Captain who does not wish to expose himself to the observation of his open deck activities is free not to submit to such an intrusion by refraining from seeking a permit. *See Biswell*, 406 U.S. at 315-16, 92 S.Ct. at 1596. *See also Wyman v. James*, 400 U.S. 309, 91 S.Ct. 381, 27 L.Ed.2d 408 (1971) (a welfare recipient may avoid an entry into his home by refusing to accept public assistance).

In determining whether warrantless searches in a closely regulated industry are reasonable we must decide whether the regulatory scheme "in terms of the certainty and regularity of its application, provides a constitutionally adequate substitute for a warrant." *Dewey*, 456 U.S. at 603, 101 S.Ct. at 2540. It is evident to us that the observer program regulation provides an adequate substitute for a warrant for several reasons.

First, the MMPA, the regulation, and the National Marine Fisheries Services' (NMFS) Manual establish a predictable and guided federal presence and limit the scope of the data collection. The MMPA delegates to the Secretary the authority to waive the moratorium on porpoise takings only when he can determine that such takings will not disadvantage protected species. The MMPA specifically sets forth permissible restrictions on the takings of porpoises and authorizes the Secretary to impose additional ones. The Act also requires publication of proposed regulations, and clearly defines its objectives and purposes.

Under the observer program, vessel owners are sent advance calendars of scheduled observer trips. This notification includes a statement of the significant regulations promulgated by the Secretary. The regulation, 50 C.F.R. § 216.24(f), limits the scope of observer activities to data collection. The National Marine Fishery Service Field Manual further defines the data collection activities of individual observers. The 1979 Manual informs observers that they are not enforcement agents and they are not

"to record extraneous comments, editorials, or personal opinions . . . or evaluate or interpret data." Observers are instructed simply to record the data called for in the form. The Manual, which is available to the industry, contains sections on the observer's responsibilities, instructions to the observers, and standardized forms to record information. The 1981 Manual additionally establishes a predeparture conference between the owner, master, observer, and an agency official to ensure a common understanding of the scope of observers' activities.

Second, the regulation requires that tuna vessel owners be given advance notice of the stationing of an observer on their vessel. Thus, the surprise element of many warrantless inspections is lacking here. *See, e.g., Delaware v. Prouse*, 440 U.S. 648, 657, 99 S.Ct. 1391, 1398, 59 L.Ed.2d 660 (1979). This advance notice also provides the Captains with an opportunity to seek judicial review of a particular scheduled observer trip. *Cf. Dewey*, 452 U.S. at 604-05, 101 S.Ct. at 2541 (opportunity for judicial review is factor important in reasonableness determination). They are also free to request a court order accommodating any privacy interests that may need protection. We conclude that the regulation as limited by the field manual provides a constitutionally adequate substitute for a warrant.

Use of observers advances the legitimate government interest of meaningful protection of the porpoise population, while the safeguards built into the observer program insure that there will be no significant intrusion on the Captains' fourth amendment interests. *Cf. Delaware v. Prouse*, 440 U.S. at 654, 99 S.Ct. at 1396 (constitutionality of a law enforcement procedure is basically tested by balancing its intrusion on fourth amendment interests against its promotion of legitimate government interests).

The Captains ask us to invalidate the observer program on the ground that a less restrictive alternative for obtaining the information exists. The government's affidavit, however, demonstrates that the suggested techniques—aerial surveillance and the like—are prohibitive in terms of cost and are ineffective in terms of data collection necessary for the Secretary to waive the moratorium on takings of porpoise and to issue permits. *Cf. Wyman*, 400 U.S. at 322, 91 S.Ct. at 388 (although secondary sources might be helpful, they would not always assure identification of information required for receipt of benefits).

In *Villamonte-Marquez*, the Court noted that the nature of water borne commerce in waters providing ready access to the open sea is sufficiently different from the nature of vehicular traffic on highways so as to make possible alternatives to the boarding of a vessel less likely to accomplish essential governmental procedures. ____ U.S. at ____, 103 S.Ct. at 2581.

CONCLUSION

We hold that the requirement that observers be permitted to board purse seiners on a scheduled basis as a condition of obtaining a permit to take porpoise is reasonable under the fourth amendment. The regulation and the field manual do not authorize the observers to conduct searches of the persons, personal effects, or living quarters of the Captains and their crews. Such a search would have to be justified independently under the fourth amendment.

The judgment in *Balelo* is reversed and remanded for further proceedings consistent with this opinion. The judgment in *Gladiator* is affirmed.

PREGERSON, Circuit Judge, concurring:

I concur in the majority's opinion but write separately to say that the observer program does not constitute a "search" within the meaning of the fourth amendment.

Fourth amendment protection operates when two conditions are met. First, a person must have exhibited an expectation of privacy in the place where the Government has allegedly intruded. Second, this expectation must be one that a free society is prepared to recognize as reasonable. *Katz v. United States*, 389 U.S. 347, 361, 88 S.Ct. 507, 516-17, 19 L.Ed.2d 576 (1967) (Harlan, J., concurring).

The tuna boat captains have failed to meet either condition. They conduct fishing operations at sea on decks covered only by the sky and open to view by other crew members, nearby vessels, and overflying aircraft.

Moreover, our society is not prepared to recognize an expectation of privacy on open tuna boat decks, which are really no different from work areas in any industry the Government regulates to safeguard the public

health and welfare. Federal inspectors, without impinging on any reasonable expectation of privacy, routinely monitor work areas in the coal mining, *Donovan v. Dewey*, 452 U.S. 594, 101 S.Ct. 2534, 69 L.Ed.2d 262 (1981) (Federal Mine Safety and Health Act of 1977), firearms, *United States v. Biswell*, 406 U.S. 311, 92 S.Ct. 1593, 32 L.Ed.2d 87 (1972) (Gun Control Act of 1968), and salmon fishing, *United States v. Raub*, 637 F.2d 1205 (9th Cir.1980) (Sockeye Salmon Fishing Act of 1947), industries, to name just a few.

In the final analysis, I think the question whether a governmental intrusion into a private area constitutes a reasonable search under the fourth amendment depends on the kind and degree of intrusion that a free society is willing to tolerate. *United States v. Solis*, 393 F.Supp. 325, 328 (C.D.Cal.1975) (Pregerson, J.), *aff'd in relevant part*, 536 F.2d 880 (9th Cir.1976). With few exceptions, our society does not tolerate warrantless intrusions into private dwellings and offices. *E.g., Camara v. Municipal Court*, 387 U.S. 523, 528-29, 87 S.Ct. 1727, 1730-31, 18 L.Ed.2d 930 (1967). But the presence on open decks of government scientists monitoring commercial fishing operations to save the porpoise from extinction is the kind and degree of intrusion that our society should tolerate.

NELSON, Circuit Judge, concurring:

If hard cases make bad law, I fear the result of cases such as this. I write specially to reveal the extraordinary difficulties I find in this case, and to explain its limited applicability.

First, I would make explicit that the search involved here is overwhelmingly intrusive. Stationing an observer on a small boat for months at a time is both a search and a massive invasion of privacy. Thus, when I balance the need for government regulation with the degree of intrusion in this case, I find both sides of the scale weighted heavily. I would not simply "assume *arguendo*" that this is a search, but would call it by its name and treat it accordingly.

Warrantless searches are presumptively unreasonable. *See, e.g., Camara v. Municipal Court*, 387 U.S. 523, 528-29, 87 S.Ct. 1727, 1730-31, 18 L.Ed.2d 930 (1967). The pervasively regulated industry exception is narrowly crafted, and should be limited as much as possible. *See See v. City of Seattle*, 387 U.S. 541, 543, 87 S.Ct. 1737, 18 L.Ed.2d 943 (1967). It is only because I view a commercial fishing vessel to be a

workplace (unlike, say, a house boat or a recreational boat) that I am willing to apply the exception here. Even then, however, I am wary of permitting warrantless searches of residences that double as workplaces. But for the unique inaccessibility of ships at sea, I would not permit a warrantless search. *See United States v. Villamonte-Marquez*, ____ U.S. ____, 103 S.Ct. 2573, 77 L.Ed.2d 22 (1983).

Second, I write to emphasize the magnitude of the governmental interest involved in this case. If the world loses genetic diversity, it has truly suffered irreparable harm. Marine mammals have long been threatened by the onslaught of technology; if we must take drastic steps to avoid further encroachment, so be it.

Last, I am struck by the precautions the government has taken to limit the intrusiveness of the observer program. The regulatory scheme is detailed; the inspectors can report about porpoises and nothing more; absolutely no alternative method of enforcement exists. Under these circumstances, I hesitantly concur. Were the situation less compelling in any respect, I would not.

TANG, Circuit Judge, with whom FERGUSON, Circuit Judge, joins, and with whom CANBY, Circuit Judge, joins in Part II, dissenting:

I respectfully dissent. In my view the challenged regulation is not authorized by Congress and the provision for warrantless searches offends the Constitution.

I

The regulation, 50 C.F.R. § 216.24(f), establishes an indefinite policy of stationing federal observers aboard tuna boats for enforcement as well as research purposes. Because Congress expressly restricted the use of observers to the two-year period following passage of the Act and limited the function of such officials to research and scientific observation, this regulation goes far beyond the design of the statute it purports to implement.

Regulations promulgated pursuant to an enabling statute will be upheld if they are reasonably related to the purposes of the enabling legislation, *Mourning v. Family Publication Service, Inc.*, 411 U.S. 356, 369, 93 S.Ct. 1652, 1660, 36 L.Ed.2d 318 (1973), but such regulations

will not be sustained when they are contrary to congressional design. "The rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather, it is 'the power to adopt regulations to carry into effect the will of Congress as expressed by the statute.'" *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213-14, 96 S.Ct. 1375, 1391, 47 L.Ed.2d 668 (1976) (quoting *Manhattan General Equipment co. v. Commissioner*, 297 U.S. 129, 134, 56 S.Ct. 397, 400, 80 L.Ed. 528 (1936)). Thus, "our primary task when testing the statutory authority of a challenged regulation must always be to determine the intent of Congress." *State of California v. Block*, 663 F.2d 855, 860 (9th Cir.1981).

In this case, the language of the statute and its legislative history both indicate that Congress intended to restrict the use of on-board observers to the two-year period following passage of the Act.

16 U.S.C. § 1381 provided:

> [a]fter timely notice and *during the period of research provided in this section*, duly authorized agents of the Secretary are hereby empowered to board and to accompany any commercial fishing vessel . . . on a regular fishing trip for the purpose of conducting research or observing operations in regard to the development of improved fishing methods and gear as authorized by this section. 16 U.S.C. § 1381(d) (1976). (emphasis added)

The period of research referred to in § 1381(d) covered "the full twenty-four calendar month period following October 21, 1972," after which the results of such research were to be reported to Congress. 16 U.S.C. § 1381(a). Funding for the observer program was also limited to the two-year period provided in the statute. The statutory objective was to use the observers as part of "a program of research and development for the purpose of devising improved fishing methods and gear so as to reduce to the maximum extent practicable the incidental taking of marine mammals in connection with commercial fishing." 16 U.S.C. § 1381(a). Congress clearly expressed its intent to use the observers only as part of a short term research program. The majority, however, sanctions the agency's administrative decision to transform one part of a limited research program into an ongoing regulatory policy of indefinite duration.

The legislative history of the observer program underscores the two-year limitation as part of the Act's congressional design. Section 1381 of the Act originated as a Senate amendment. The Senate report indicates that Congress intended the observer research and development program to terminate two years after passage of the Act. The majority is simply incorrect when it suggests that the observer program was merely a model after which a regulatory observer policy could be patterned. "The committee has authorized a $2 million, 2-year program to devise new methods of netting and tuna boat operating procedures which will reduce the killing of marine mammals. The committee has provided a 2-year period because it is believed that science can come up with new systems within that time." S.Rep. No. 863, 92nd Cong., 2d Sess. 9-10 (1972). At the end of the two-year period, the best available fishing methods, if feasible, were to be mandated on commercial fishing vessels, S.Rep., *supra* at 21. The research program, including its $2 million appropriation and federal observer component, was restricted to a two-year period in clear and explicit terms. Neither the statutory language nor the legislative history of the observer program hint that the agency retained any discretion to extend the use of on-board observers beyond the explicit two-year period.

In addition to its unauthorized extension of the operative period for the observer program, the regulation also expands the function of the government observers beyond the research component contemplated by Congress by enlisting them as inspection and enforcement officials. When Congress created the two-year observer program, it expressly stated that the observer presence was a research tool aimed at "the development of improved fishing methods and gear as authorized by this section." 16 U.S.C. § 1381(d). The regulation, however, extends the duration of the observer presence indefinitely and transforms the observers from mere researchers into enforcement officers who collect information for use against the fishermen in civil and criminal actions. To label them now merely "observers" is an understatement. They are now federal inspectors who maintain constant surveillance to ensure that fishermen comply with federal law. The majority is correct to say this is probably the most efficient way to guarantee that the fishermen fish by the rules, but it is not what Congress provided. The observer program was not developed in a spirit of expediency. If Congress contemplated the use of live-in observers for enforcement purposes, it could have expressly provided for such a function in the observer statute or at least granted the Secretary the discretion to create additional functions for the observers.

Instead, Congress specifically addressed the methods of enforcing the statutory scheme in § 1377 of the Act, which allows warrantless searches of vessels only if there is "reasonable cause to believe" that a vessel or crew member is violating the Act or its regulations. 16 U.S.C. § 1377(d).[1] Hence, the very structure of the Act itself—indeed its own language—indicates that Congress did not envision warrantless searches by on-board observers as an enforcement mechanism. The majority, however, seizes on that part of the language of § 1377 which suggests that the enforcement measures it authorizes are "in addition to any other authority conferred by law." 16 U.S.C. § 1377(d). The majority asserts that this language indicates that Congress vested the Secretary with the power to create additional enforcement measures even in contravention of the express statutory limitations of § 1377. Under the majority's reading of the statute, the Secretary, apparently without limitation, may abrogate the explicit search and seizure restrictions of § 1377 and effectively render most of that section a nullity. Beyond the fact that neither the plain language of the statute nor its legislative history substantiates such an interpretation, the majority's reading defies basic principles of statutory construction because "acceptance of that meaning would lead to absurd results . . . or would thwart the obvious purpose of the statute." *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643, 98 S.Ct. 2053, 2061, 56 L.Ed.2d 591 (1978) (*quoting Commissioner v. Brown*, 380 U.S. 563, 571, 85 S.Ct. 1162, 1166, 14 L.Ed.2d 75 (1965)). This self-emasculating inter-

1. Execution of process; arrest; search; seizure

(d) Any person authorized by the Secretary to enforce this subchapter may execute any warrant or process issued by any officer or court of competent jurisdiction for the enforcement of this subchapter. Such person so authorized may, in addition to any other authority conferred by law—

(1) with or without warrant or other process, arrest any person committing in his presence or view a violation of this subchapter or the regulations issued thereunder;

(2) with a warrant or other process, or without a warrant if he has reasonable cause to believe that a vessel or other conveyance subject to the jurisdiction of the United States or any person on board is in violation of any provision of this subchapter or the regulations issued thereunder, search such vessel or conveyance and arrest such person;

(3) seize the cargo of any vessel or other conveyance subject to the jurisdiction of the United States used or employed contrary to the provision of this subchapter or the regulations issued hereunder or which reasonably appears to have been so used or employed; and

(4) seize, whenever and wherever found, all marine mammals and marine mammal products taken or retained in violation of this subchapter or the regulations issued thereunder and shall dispose of them in accordance with regulations prescribed by the Secretary.

16 U.S.C. 1377(d).

pretation of § 1377 is contrary to the presumption against reading a statute in a manner which renders it ineffective. *F.T.C. v. Manager, Retail Credit Co.*, 515 F.2d 988, 995 (D.C.Cir.1975). The majority's reading of § 1377 exaggerates the language of a single phrase to eviscerate the statute's internal enforcement scheme, a scheme that was designed to enforce the Act without disregarding the privacy concerns of those who would be subject to it.

The majority suggests that subsequent congressional inaction infers approval of the way observers are used under the regulation. Such inaction is not a helpful indicator of congressional intent when the statutory language itself suggests a contrary interpretation. *S.E.C. v. Sloan*, 436 U.S. 103, 117, 98 S.Ct. 1702, 1711, 56 L.Ed.2d 148 (1978). When Congress has squarely faced the propriety of a regulatory measure, congressional non-action may be evidence of congressional approval. *Bob Jones University v. United States*, ____ U.S. ____, 103 S.Ct. 2017, 2033, 76 L.Ed.2d 157 (1983). Absent such direct consideration, however, "[n]onaction by Congress is not often a useful guide. . ." *Bob Jones University, supra*, at 2033.

The majority attempts to bolster its finding of congressional approval by noting that Congress has amended the Act without disturbing the Secretary's use of on-board observers. This argument is unpersuasive because the on-board observer program was not specifically addressed in subsequent legislative action. Indeed, the Supreme Court recently rejected such an argument in *Aaron v. S.E.C.*, 446 U.S. 680, 100 S.Ct. 1945, 64 L.Ed.2d 611 (1980). There, the Court refused to adopt an agency's statutory interpretation which was premised on congressional failure to disturb that interpretation in subsequent legislative amendments to the authorizing act. "[S]ince the legislative consideration of those statutes was addressed principally to matters other than that at issue here, it is our view that the failure of Congress to overturn the Commission's interpretation falls far short of providing a basis to support a construction of § 10(b) so clearly at odds with its plain meaning and legislative history." *Id.* at 694, n. 11, 100 S.Ct. at 1954, n. 11.

Because the plain language of § 1381 and its legislative history demonstrate that the on-board observer program was limited to research duties during the two-year period following passage of the Act, the Secretary's regulation adopting an indefinite policy of on-board observers for enforcement purposes as well as research is unauthorized.

II

The absence of statutory authorization, however, is only one basis for finding this regulation invalid. The regulation also offends the Constitution because it empowers federal inspectors to conduct searches in violation of the fourth amendment.

The majority, in its discussion of the regulation's fourth amendment impact, side-steps and fails to confront the threshold question of whether the intrusiveness of stationing government observers on private fishing vessels for extended periods constitutes a search. The majority suggests that the observer policy may not constitute a search within the meaning of the fourth amendment because the government officials confine their observations to the open deck or open sea. This understates the actual operation of the observers. They are more than mere passive onlookers; they are uninvited government inspectors who live with the crew for weeks at sea, watching all aspects of fishing operations, conducting research and collecting data and information that may be used against the tuna fishermen in civil and criminal proceedings. This is not "a brief detention where officials come on board, visit public areas of the vessel, and inspect documents." *United States v. Villamonte-Marquez*, ___ U.S. ___, 103 S.Ct. 2573, 2581, 77 L.Ed.2d 22 (1983). This regulation places live-in government inspectors on private vessels for surveillance purposes over a period of months and results in the type of governmental invasion that is well within the protection of the fourth amendment. Despite the majority's ambivalence on this issue, the use of government inspectors under the regulation is a search within the meaning of the fourth amendment. As such, it is presumptively unconstitutional in the absence of a warrant, and "[t]he burden is on the government to prove that the departure from the warrant requirement was justified." *United States v. Martin*, 693 F.2d 77, 78 (9th Cir. 1982) (per curiam); *Coolidge v. New Hampshire*, 403 U.S. 443, 455, 91 S.Ct. 2022, 2032, 29 L.Ed.2d 564 (1971).

The majority decides, however, that even if this use of observers constitutes a search, it is reasonable because it falls within the pervasively regulated industry exception to the warrant requirement. The majority suggests that because the tuna fishing industry has been subject to government regulation, the acceptance of federal observers must be part of the regulatory burden that goes with the benefit of tuna fishing. The majority ventures into uncharted territory, however, because the Supreme Court has admonished that the regulated industry exception is a

narrow one, one that neither the Supreme Court nor this court has ever embraced in the absence of explicit statutory authorization for the warrantless search scheme it purports to justify. Moreover, the regulated industry exception has never been used to justify warrantless surveillance schemes such as the one in this case. Until now, the exception has only applied to warrantless inspections of particular businesses on a periodic basis. The majority breaks new ground by applying the exception to warrantless surveillance schemes conducted for days and months at a time.

In regulated industry cases, warrantless searches are still presumptively unreasonable and the government retains the burden of justifying its disregard for the warrant requirement. *Marshall v. Barlow's Inc.*, 436 U.S. 307, 312-13, 98 S.Ct. 1816, 1820-21, 56 L.Ed.2d 305 (1978). "The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property." *Id.*, at 312, 98 S.Ct. at 1820 (quoting *See v. Seattle*, 387 U.S. 541, 543, 87 S.Ct. 1737, 1739, 18 L.Ed.2d 943 (1967)). In this case, the government has failed to meet its burden of justifying the warrantless intrusions which the challenged regulation authorizes.

Under the pervasively regulated industry exception, a warrant may not be required "when Congress has reasonably determined that warrantless searches are necessary to further a regulatory scheme and the federal regulatory presence is sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes." *Donovan v. Dewey*, 452 U.S. 594, 600, 101 S.Ct. 2534, 2539, 69 L.Ed.2d 262 (1981). While planting government observers on fishing vessels for the duration of the expeditions may offer the most efficient method of policing the Act, enthusiasm for this enforcement technique should not obscure the essential constitutional requirement that the warrantless quality of such a procedure must be vital to the regulatory scheme. The government has not proffered any convincing explanation why waiver of the warrant requirement is essential to the enforcement of the Act or to the effective implementation of the observer program.

In *Donovan v. Dewey*, 452 U.S. 594, 101 S.Ct. 2534, 69 L.Ed.2d 262 (1981), the Supreme Court upheld a warrantless search scheme under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 813(a) (1976). The statute allowed federal mine inspectors to make unannounced inspections of underground mines four times a year and surface mines

twice a year. The Court noted that a warrant requirement could frustrate such an inspection scheme because unannounced inspections were needed to effectuate the scheme's objective of deterring hazardous mine conditions. *Id.* at 603, 101 S.Ct. at 2540. In *United States v. Kaiyo Maru No. 53*, 699 F.2d 989 (9th Cir.1983), this court upheld a warrantless search scheme designed to enforce the Fishery Conservation and Management Act. 16 U.S.C. § 1861(b). The court concluded that dispensing with the warrant requirement for Coast Guard inspections of fishing boats in the Fishery Conservation Zone was necessary due to the logistical barriers of obtaining a warrant for ships at sea. *Id.* at 995.

A comparable element of necessity is missing in this case. The regulation authorizes boarding by federal observers at the time of departure and provides for notification of the observer presence several days before the expedition begins. After they are aboard, the observers make their observations and inspections throughout the duration of the fishing trip. Nothing in this procedure indicates that a warrant requirement would frustrate the objectives of the regulatory search scheme. Research and observation activities under the regulatory procedure can be conducted in the same manner whether or not a warrant is obtained. Although a warrant requirement in this case might be an administrative annoyance, the inconvenience it poses is an insufficient basis to "vitiate the general constitutional requirement that for a search to be reasonable a warrant must be obtained." *Marshall*, 436 U.S. at 324, 98 S.Ct. at 1827. Moreover, a warrant requirement pursuant to a regulatory search scheme need not be based on evidence of specific violations or actions on particular boats. A warrant requirement in this context would be designed to ensure governmental compliance with reasonable legislative and regulatory standards for the frequency and scope of the search operation. *Id.* at 320, 98 S.Ct. at 1824; *Camara v. Municipal Court*, 387 U.S. 523, 538, 87 S.Ct. 1727, 1735-36, 18 L.Ed.2d 930 (1967). Such a requirement preserves the historic function of checking the potential for arbitrary government conduct without frustrating the legitimate objectives of the Marine Mammal Protection Act. This balance is especially important as virtually all guidelines regarding the conduct of the observer operation emanate from internal agency policies instead of statutory or regulatory guidelines with force of law.

As the reasonableness of a regulatory search scheme "depends on the specific enforcement needs and privacy guarantees of each statute," *Kaiyo Maru No. 53*, 699 F.2d at 995, and as the burden of demonstrating the need to by-pass the warrant requirement rests with the government, the absence of any persuasive proof that warrantless searches are

necessary calls for adherence to the general rule instead of the exception. A warrant is required for this regulatory search scheme.

III

Because 50 C.F.R. § 216.24(f) exceeds congressional authorization and establishes a search scheme in violation of the fourth amendment of the Constitution, I dissent.

FERGUSON, Circuit Judge, dissenting:

Today the majority installs a federal agent in the temporary home of 14 to 18 fishermen for a two- to three-month period without requiring a warrant or a showing of probable cause to believe that the law has been broken. The fourth amendment assuring that the people are to be secure in their homes, mandates that warrantless government intrusion into even a temporary home is *per se* unreasonable. This protection is not lost because the place called home is also used for commercial purposes, i.e. as a fishing vessel, for both commercial premises and seafaring vessels are covered by the fourth amendment.

The National Oceanic and Atmospheric Administration (NOAA), an agency of the federal government, has by regulation placed federal agents on board tuna fishing vessels for two- to three-month fishing trips by conditioning the license to fish for tuna upon the vessel owner's consent to the presence of federal observers. 50 C.F.R. § 216.24(f) (1982). The federal "observers" are authorized to conduct research and collect information "which may be used in civil or criminal penalty proceedings, forfeiture actions, or permit or certificate sanctions." *id.* § 216.24(f)(1), while they live for the extended fishing trip on a 150- to 250-foot boat with the crew of 14-18 men. M.K. Orbach, *Hunters, Seamen, and Entrepreneurs* (1977) (hereinafter "Orbach"). It has been stipulated by the parties that the observers take their meals with the fishermen, are not confined to any particular areas of the vessel, and are expected to "maintain open communication" with and question vessel operators and other personnel while recording data pertaining to the enforcement of the Marine Mammal Protection Act, 16 U.S.C. §§ 1361-1407.

Any possibility of separating the business aspects of a fishing vessel from the home aspects is belied by the realities of life on such a vessel:

> [I]t is impossible to get more than about 50 feet from any of the other 15 men with whom you are going to spend the next two months. You can draw curtains or close doors and remain out of sight a good part of the time, but you can never get *away* from them, and the fishing process forces you into regular interaction with them.

Orbach at 25 (emphasis in original). Both Congress and the Supreme Court have acted to specially protect the rights and comforts of seamen due to this unusual characteristic of their work. *See Aguilar v. Standard Oil Co.*, 318 U.S. 724, 732, 63 S.Ct. 930, 934-35, 87 L.Ed. 1107 (1943) ("Of necessity, during the voyage [the seaman] must eat, drink, lodge and divert himself within the confines of the ship. In short, during the period of his tenure the vessel is not merely his place of employment; it is the framework of his existence."); *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 782, 72 S.Ct. 1011, 1014, 96 L.Ed. 1294 (1952); *Warner v. Goltra*, 293 U.S. 155, 162, 55 S.Ct. 46, 49, 79 L.Ed. 254 (1934), ("[T]he maritime law by inveterate tradition has made the ordinary seaman a member of a favored class.").

The NOAA's effort to install a federal agent on board a fishing vessel without securing a warrant based on probable cause is reminiscent of the "indiscriminate searches and seizures conducted under the authority of 'general warrants' [which] were the immediate evils that motivated the framing and adoption of the Fourth Amendment." *Payton v. New York*, 445 U.S. 573, 583, 100 S.Ct. 1371, 1378, 63 L.Ed.2d 639 (1980); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 311, 98 S.Ct. 1816, 1819-20, 56 L.Ed.2d 305 (1978). The fourth amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects. . . ." The Supreme Court has defined the scope of the fourth amendment to include a person's "reasonable expectation of privacy." *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). Such a definition extends fourth amendment protections beyond the literal meaning of "houses" to temporary residences, such as a hotel, *Stoner v. California*, 376 U.S. 483, 490, 84 S.Ct. 889, 893, 11 L.Ed.2d 856 (1964), a rooming house, *McDonald v. United States*, 335 U.S. 451, 69 S.Ct. 191, 93 L.Ed. 153 (1948), and even a mobile home, *People v. Carney*, 34 Cal.3d 597, 194 Cal.Rptr. 500, 668 P.2d 807 (1983) and to commercial premises, *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 329, 99 S.Ct. 2319, 2326, 60 L.Ed.2d 920 (1979) (adult bookstore); *Mancusi v. DeForte*, 392 U.S.364, 367, 88 S.Ct. 2120, 2123, 20 L.Ed.2d 1154 (1968) (office); *See v. City of Seattle*, 387 U.S. 541, 543, 87 S.Ct. 1737, 1739, 18 L.Ed.2d 943 (1967) (warehouse), as well as to seafaring vessels, *United States v. Villamonte-*

Marquez, ____ U.S. ____, 103 S.Ct. 2573, 2581, 77 L.Ed.2d 22 (1983), and automobiles, *Delaware v. Prouse*, 440 U.S. 648, 662-63, 99 S.Ct. 1391, 1400-01, 59 L.Ed.2d 660 (1979). More important, the "Fourth Amendment protects people, not places," *Katz v. United States*, 389 U.S. at 351, 88 S.Ct. at 511, and thus prohibits warrantless surveillance of a person's ordinarily private actions and words. *Id; United States v. United States District Court*, 407 U.S. 297, 313, 92 S.Ct. 2125, 2134-35, 32 L.Ed.2d 752 (1972). As the Court stated over twenty years ago:

> At the very core [of the fourth amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion. This Court has never held that a federal officer may without warrant and without consent physically entrench into a man's office or home, there secretly observe or listen, and relate at the man's subsequent criminal trial what was seen or heard.

Silverman v. United States, 365 U.S. 505, 511-12, 81 S.Ct. 679, 683, 5 L.Ed.2d 734 (1961) (citations omitted). It is precisely this "right to be let alone," *Olmstead v. United States*, 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting), that is trampled when tuna fishermen are required to live, eat, sleep, lodge and relax in the presence of a federal agent within the confines of a 150- to 250-foot boat in the middle of the ocean for two to three months at a time.

The fourth amendment provides that "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . particularly describing the place to be searched, and the persons or things to be seized." A warrantless search is presumptively unreasonable. *Payton v. New York*, 445 U.S. at 586 n. 25, 100 S.Ct. at 1380 n. 25; *Marshall v. Barlow's, Inc.*, 436 U.S. at 312, 98 S.Ct. at 1820; *United States v. United States District Court, supra*. If the reasonableness of a search could be based "on little more than a subjective view regarding the acceptability of certain sorts of police conduct, and not on considerations relevant to Fourth Amendment interests . . . Fourth amendment protection in this area would approach the evaporation point." *Chimel v. California*, 395 U.S. 752, 764-65, 89 S.Ct. 2034, 2041, 23 L.Ed.2d 685 (1969). Rather, "a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant" or falls within one of carefully defined exceptions to the warrant requirement. *Camara v. Municipal Court*, 387 U.S. 523, 528-29, 87 S.Ct. 1727, 1730-31, 18 L.Ed.2d 930 (1967). This rule must be strictly enforced as "[t]he right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a

society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent." *Id.* at 529, 87 S.Ct. at 1731 (quoting *Johnson v. United States*, 333 U.S. 10, 14, 68 S.Ct. 367, 369, 92 L.Ed. 436 (1948)). As shown by Judge Tang in his dissent, the regulation at issue here cannot be justified under any of the recognized exceptions to the warrant requirement, particularly the "pervasively regulated industry" exception.

Tuna fishermen do not waive their right to be free from unreasonable search or surveillance by temporarily living onboard a fishing vessel. The fishing boat is not just their place of employment, but for two to three months it is "the framework of [their] existence," *Aguilar v. Standard Oil Co.*, 318 U.S. at 732, 63 S.Ct. at 934, and their home. This home cannot be entered by law enforcement officers absent a warrant based on probable cause to believe that a crime has been or is being committed. It is well established that an administrative regulation which by its terms violates the fourth amendment is unconstitutional and should not be enforced. *Marshall v. Barlow's, Inc., supra.*

The majority states that it is necessary to place federal observers aboard tuna fishing vessels to protect the lives of porpoises. Maj.op., at 760, 761. However, it fails to address the question whether a warrant authorizing the placement of such observers on a case-by-case basis would undercut the objectives of the Marine Mammal Protection Act. Clearly, if a warrant is required under the Marine Mammal Protection Act, those on the fishing vessel upon which an observer may be stationed could conceal no more than they could conceal with the federal agent forced aboard without the prophylatic protections of a warrant issued by a neutral officer. *See Marshall v. Barlow's, Inc.*, 436 U.S. at 323, 98 S.Ct. at 1826. Moreover, the regulation by its own terms undermines the argument that notice would frustrate the objectives of the observer program as it provides that the fishing vessel owner receive notice of the placement of an "observer" five days prior to the voyage. 50 C.F.R. § 216.24(f)(4). Contrary to the majority position (maj.op., at 765), mere knowledge of the existence of a regulatory purpose cannot eliminate one's expectation of privacy, for that would consume the rule against warrantless searches in the exception. *Cf. Michigan v. Tyler*, 436 U.S. 499, 508, 98 S.Ct. 1942, 1949, 56 L.Ed.2d 486 (1978).

The majority states that the warrantless quartering of a federal agent on a 30-60 day fishing trip is so clearly limited by regulation that the regulation is the substantial equivalent of a warrant. Maj.op. at 765-766. However, it has been recognized that when law enforcement officers are lawfully on the premises for limited purposes, the restrictions placed on the scope of their search or duties "may be more theoretical than real." *Payton v. New York*, 445 U.S. at 589, 100 S.Ct. at 1381. Moreover, the majority's position that the observer may legitimately gather evidence in "plain view" on the ship belies the weight of the limitations placed on the observer by the regulations. Maj.op., at 763. The fishermen are placed in the position of hiding their everyday acts and comments from the federal agent in order to establish and protect their fundamental right to be let alone. *See Illinois v. Andreas*, ___ U.S. ___, 103 S.Ct. 3319, 3327, 77 L.Ed.2d 1003 (1983) (Brennan, J., dissenting). The NOAA has made the price of being a tuna fisherman include the "dread of subjection to an unchecked surveillance power." *United States v. United States District Court*, 407 U.S. at 314, 92 S.Ct. at 2135.

The fourth amendment was a response to the general warrant whereby an officer was authorized to search private premises without evidence of unlawful activity. *Marshall v. Barlow's, Inc.*, 436 U.S. at 311, 98 S.Ct. at 1819-20. Today the majority holds that a federal agent cannot only search a private vessel, but collect data, question fishermen, and live on the vessel for months at a time without the need to secure a warrant based on a legitimate suspicion of unlawful activity. The regulation at issue here can subject "even the most law-abiding citizen" to unprecedented and unjustified government intrusion and surveillance. *See Camara v. Municipal Court*, 387 U.S. at 530, 87 S.Ct. at 1731. Surely the lives of porpoises cannot be more sacred to us than the right to privacy and freedom from government intrusion protected by the fourth amendment.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN R. BALELO, et al.,

Plaintiffs-Appellees,

-vs-

MALCOLM BALDRIDGE,* Secretary of Commerce of the United States, et al.,

Defendants-Appellants.

No. 81-5806

D.C. No. CV 80-1646 GT (H)

JOHN R. BALELO, et al.,

Plaintiffs-Appellees,

-vs-

MALCOLM BALDRIDGE,* Secretary etc.,

Defendants,

and

ENVIRONMENTAL DEFENSE FUND, INC. and DEFENDERS OF WILDLIFE, INC.,

Intervenors-Defendants-Appellants.

No. 81-5807

OPINION

Appeal from the United States District Court
for the Southern District of California
Gordon Thompson, Jr., District Judge, Presiding
Argued and Submitted August 4, 1982

BEFORE: ELY, GOODWIN, and WALLACE, Circuit Judges.

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* We substitute Malcolm Baldridge, the Secretary of Commerce, as successor to the original appellant Philip M. Klutznick, the former Secretary, pursuant to Fed. R. App. P. 43(c).

WALLACE, Circuit Judge:

Balelo and other tuna boat captains (the captains) brought this action seeking a declaration that 50 C.F.R. § 216.24(f), promulgated by the Secretary of Commerce (the Secretary), is invalid because it requires the captains to allow government observers on board their ships to qualify for permits allowing the incidental taking of porpoises during tuna fishing. The captains also seek to enjoin the Secretary's conditioning of permits on acquiescence to the observer program and the use of any observer-gathered data or its fruits in civil, criminal, and administrative proceedings.

The district court held that the regulation is invalid insofar as it permits the use of observers to gather information for purposes other than scientific research and enjoined the Secretary's use of the information in civil and criminal penalty proceedings or as grounds for administrative sanctions. The district court also enjoined the Secretary's conditioning the grant of porpoise-taking permits upon acceptance of on-board observers who might collect information to be used for non-scientific purposes. The Secretary did not challenge the district court's order except by arguing that the regulation is valid. We therefore found it unnecessary, with one exception, to express any opinion on whether the scope of the relief granted was appropriate. We affirm in part, reverse in part and remand.

I

The facts of this case are detailed in the district court's opinion, 519 F. Supp. 573 (S.D. Cal. 1981). Briefly, tuna, especially yellowfin, tend to swim in association with certain species of porpoise. Capitalizing on this known, but scientifically unexplained phenomenon, tuna fishermen often set their nets around schools of porpoise to capture the tuna swimming beneath. When the nets are pursed, porpoises as well as tuna often are caught; the porpoises, air-breathing mammals, sometimes are drowned or injured.

In 1972 Congress enacted the Marine Mammal Protection Act, 16 U.S.C. §§ 1361-407 (the Act). The Act imposed a moratorium on the taking of marine mammals, but permitted takings incidental to commercial fishing during a two-year period. *Id.* § 1371. The Act permitted authorized observers to board commercial fishing vessels during the two-year period, after notice, for purposes of research and observation. *Id.* § 1381(d). In 1974, both the statutory research observation program and

the commercial fishing exemption expired. Commercial fishermen now are allowed to take marine mammals incidentally during fishing operations only under permits issued subject to the Secretary's regulations. The Act provides severe civil and criminal penalties for violations of its provisions or of the regulations and permits issued by the Secretary. Fines not to exceed $10,000 or $20,000 per violation, imprisonment for not more than one year per violation, and forfeiture of the violator's cargo may be imposed. *Id.* §§ 1375-76.

The captains specifically challenge the validity of 50 C.F.R. § 216.24(f)(1), which provides:

> The vessel certificate holder of any certificated vessel shall, upon the proper notification by the National Marine Fisheries Service, allow an observer duly authorized by the Secretary to accompany the vessel on any or all regular fishing trips for the purpose of conducting research and observing operations, including collecting information which may be used in civil or criminal penalty proceedings, forfeiture actions, or permit or certificate sanctions.

The captains argue that the regulation subjects them to a search that is neither statutorily authorized nor constitutionally permissible. The Secretary argues that the regulation is authorized by section 103 of the Act, 16 U.S.C. § 1373, which empowers the Secretary to:

> prescribe such regulations with respect to the taking . . . of animals from each species of marine mammal . . . as he deems necessary and appropriate to insure that such taking will not be to the disadvantage of those species and population stocks and will be consistent with the purposes and policies [of this Act].

The Secretary further argues that an observer's presence on the ship does not constitute a search. Alternatively, the Secretary argues that even if stationing an observer aboard constitutes a search, the search is constitutionally permissible under the pervasively-regulated industry exception established by *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970), and *United States v. Biswell*, 406 U.S. 311 (1972), and most recently applied by the Supreme Court in *Donovan v. Dewey*, 452 U.S. 594 (1981).

II

The first question we address is whether stationing an observer aboard a tuna boat constitutes a search. We agree with the district judge's conclusion that it does. Although not every boarding constitutes a search, *see United States v. Olander*, 584 F.2d 876, 888 (9th Cir. 1978) (boarding to serve process), *vacated on other grounds sub nom. Harrington v. United States*, 443 U.S. 914 (1979), boarding of a vessel for any type of investigation or inspection is a search within the scope of the fourth amendment. *United States v. Raub*, 637 F.2d 1205, 1208 (9th Cir.), *cert. denied*, 449 U.S. 922 (1980). The boarding and stationing of government agents on tuna boats, as mandated by the regulation, subjects the captain and crew at the very least to an inspection of their fishing operations. Whether the government intends to use the information it gathers for scientific research alone or in criminal and civil proceedings, the inspection falls within the fourth amendment.

This result is consistent with the rationale of *Katz v. United States*, 389 U.S. 347 (1967), where the Supreme Court held that a violation of an individual's "legitimate expectation of privacy," *see Rakas v. Illinois*, 439 U.S. 128, 143 (1978), constitutes a fourth amendment search. Commercial fishermen often operate in isolated areas of the ocean. Although their operations are in areas accessible to law enforcement officers and to the public, giving them no reasonable expectation of absolute privacy, we conclude that they could reasonably expect a greater amount of privacy than that available in the presence of uninvited on-board observers.

The Secretary argues that the "plain view" doctrine applies because the fishing operations occur in waters accessible to the public. Under the "plain view" doctrine, an officer whose presence at a certain location is legal may observe his surroundings without violating the fourth amendment. *See Colorado v. Bannister*, 449 U.S. 1, 4 & n.4 (1980) (per curiam); *Harris v. United States*, 390 U.S. 234, 236 (1968); *United States v. Wheeler*, 641 F.2d 1321, 1324-25 (9th Cir. 1981). The Secretary argues that because government agents could be present legally in the vicinity of any tuna boat by use of an airplane or another vessel and could observe legally the fishing operations in "plain view," he is simply procuring information in a more efficient way.

The Secretary's argument distorts the "plain view" doctrine. The protections of the fourth amendment are not abrogated simply because information is otherwise legally accessible. Information legally accessible

should be legally procured. If it is so procured, no violation of the fourth amendment occurs. If, however, it is procured via an unreasonable search, a fourth amendment violation occurs. *See Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 329 (1979) (retail store inviting the pubic to enter consents only to examination of merchandise in the manner used by the ordinary customer). The plain view doctrine comes into play when a government officer is legally present and then observes something in plain view. *See, e.g., Colorado v. Bannister, supra; Harris v. United States, supra*. Here, the government attempts to use its police powers to require mandatory observer presence on the fishing vessel and then to allow the observer to report what he saw. This avenue of access to information about the vessel's fishing operations is not accessible to the public; the information which might be procured by on-board observers does not fall under the plain view doctrine.

III

Holding that the plain view doctrine does not apply and that the forced presence of an on-board observer constitutes a search under the fourth amendment is only our first step. Our next inquiry does not require us to go so far as to determine whether there was a constitutional violation. In this case, we need only determine if the observer program raises substantial constitutional questions. When agency action raises issues of "questionable constitutionality," *see Greene v. McElroy*, 360 U.S. 474, 506-08 (1959), the statutory authorization for that action must be clear. We conclude that there is no clear statutory authorization for the observer program and therefore hold that promulgation of the regulations establishing the program was outside the power granted the Secretary.

Although courts ordinarily give deference to agency interpretations of the statutes they are charged to enforce, *see New York State Department of Social Services v. Dublino*, 413 U.S. 405, 421 (1973); *Adams v. Howerton*, 673 f.2d 1036, 1040 (9th Cir.), *cert. denied*, 102 S. Ct. 3494 (1982), such deference is inappropriate when an agency interprets its general enabling legislation to permit actions of doubtful constitutionality. In *Greene v. McElroy, supra*, the Supreme Court held that absent explicit presidential or congressional authorization, an agency could not deprive a federal employee of his job in a proceeding in which he was not afforded the right to confront and cross-examine witnesses. The Court found that executive orders granting the agency power to establish a system to protect classified information was not a sufficient authorization. The Court reasoned that, absent an express contrary indication, it

assumes that Congress or the President intends to afford persons traditional constitutional rights. Therefore, administrative action raising serious constitutional questions must be explicitly authorized. A decision to employ constitutionally questionable procedures

> must be made explicitly not only to assure that individuals are not deprived of cherished rights under procedures not actually authorized, . . . but also because explicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws. Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them.

360 U.S. at 507 (citation omitted). The Court held that before it would decide whether a person could be deprived of his employment in a proceeding not permitting confrontation of witnesses, "it must be made clear that the President or Congress, within their respective constitutional powers, specifically has decided that the imposed procedures are necessary and warranted and has authorized their use." *Id.; cf. Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1052 (8th Cir. 1978) ("[W]here . . . potential incursions into sensitive constitutional rights are involved, careful scrutiny is required in delineating the scope of authority that Congress intended the agency to exercise."), *aff'd*, 440 U.S. 689 (1979).

Under the regulations promulgated by the Secretary, a tuna boat operator must agree to allow observers aboard to qualify for a permit allowing the incidental taking of porpoise during fishing operations. We have concluded that stationing the observer on board constitutes a search. Therefore, if such searches raise serious constitutional questions, the observer program must be invalidated. We conclude that they do.

In *See v. City of Seattle*, 387 U.S. 541 (1967), the Supreme Court held that warrantless administrative entry, without consent, into the portions of commercial premises that are not open to the public violates the fourth amendment. *Id.* at 545. The Court reasoned:

> As we explained in *Camara* [*v. Municipal Court*, 387 U.S. 523 (1967)], a search of private houses is presumptively unreasonable if conducted without a warrant. The

> businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. The businessman, too, has that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by a warrant.

Id. at 543. Based on our reading of this statement, we conclude that warrantless searches of tuna boats by government observers are presumptively unreasonable. Therefore, unless these searches fall within a recognized exception to the warrant requirement, they raise serious constitutional questions.

The Secretary contends that the observer program falls within the pervasively-regulated industry exception to the warrant requirement established by *Colonnade Catering Corp. v. United States, supra*, and *United States v. Biswell, supra*. *Colonnade* dealt with warrantless inspections of commercial premises in the regulation of liquor sales; *Biswell* dealt with such searches in the regulation of firearms. More recently, the Court upheld the warrantless inspection of mines. *Donovan v. Dewey*, 452 U.S. 594 (1981). The Court has observed, however, that these cases are "exceptions" involving "relatively unique circumstances." *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313 (1978).

The pervasively-regulated industry cases are distinguishable from the case before us. In each case upholding a warrantless search, the inspection was expressly authorized by statute. *See Donovan v. Dewey, supra*, 452 U.S. at 596; *United States v. Biswell, supra*, 406 U.S. at 311-12. The statute in each case was a critical factor in the Court's determination that an exception to the warrant requirement was appropriate. In *Biswell*, the Court stated that "the legality of the search depends not on consent but on the authority of a valid statute." 406 U.S. at 315. In *Donovan v. Dewey*, the Court explained that an exception to the warrant requirement can be recognized only when a "statute's inspection program, in terms of the certainty and regularity of its application, provides a constitutionally adequate substitute for a warrant." 452 U.S. at 603. *See also Colonnade Catering Corp. v. United States, supra*, 397 U.S. at 73 nn.1 & 2, 77 (statute did not include forcible entries without a warrant; applying fourth amendment standards); *United States v. Raub, supra*, 637 F.2d at 1207 (holding that search of a fishing vessel in area where certain fishing

rights were reserved for Indians was within administrative search exception to warrant requirement) ("Both the statute under which the [fishing] regulations were promulgated and the court orders authorized enforcement agents to board vessels without warrants to check identification and to ascertain whether fishermen were in compliance with the applicable fishing regulations.") (footnote omitted).

None of the cases dealt with the issue before us: whether regulations promulgated under a statute authorizing an agency to prescribe regulations to carry out the purposes of an act, but not specifically authorizing warrantless searches, are valid. Our review of the cases convinces us that express statutory authorization of the inspections was critical to their holdings and that, absent that authorization, administrative regulations would not have been held sufficient. The statutes made it clear that Congress had decided "that the imposed procedures [were] necessary and warranted and [had] authorized their use." *Greene v. McElroy, supra*, 360 U.S. at 507.

The limited nature of our holding in this case is obvious. We need not decide whether a properly authorized observer program is constitutional. The current program is of questionable constitutionality because it includes warrantless searches; those searches are not expressly authorized by Congress. Also, we need not decide whether adequate congressional authorization could ever be found in the absence of an express statutory statement.[1] We think that it would be difficult for Congress to manifest clearly its authorization in another manner, but we only hold that congressional authorization in this case is not clear. Except for the general enabling statute, the Secretary's only evidence of congressional authorization is testimony from the Congressional Oversight Hearings held in 1977, five years after the enabling legislation was passed. Whatever the significance of that evidence, it is irrelevant. Congressional authorization in areas of doubtful constitutionality "cannot be assumed by acquiescence or non-action." *Id.* Even assuming that Congress,

1. None of the cases cited to us by the Secretary suggests that an express statutory authorization is dispensable. *United States v. Schafer*, 461 F.2d 856 (9th Cir.), *cert. denied*, 409 U.S. 881 (1972), and *United States v. Watson*, 678 F.2d 765 (9th Cir. 1982), both dealt with regulations promulgated under statutes that expressly authorized inspections. *United States v. Davis*, 482 F.2d 893 (9th Cir. 1973), dealt with regulations promulgated under the auuthority of an executive order, and is not helpful on the question of congressional authorization. *United States v. Rucinski*, 658 F.2d 741 (10th Cir. 1981), *cert. denied*, 102 S. Ct. 1430 (1982), is not binding precedent in this circuit and is distinguishable because it raises questions of contract and waiver that we need not and do not address.

without amending the statute, indicated its approval of the Secretary's actions, that approval is not sufficient evidence of authorization.

We therefore conclude that congressional authorization for the warrantless inspection of tuna boats is not clear, that promulgation of the observer program was not within the powers that Congress granted the Secretary, and that the regulation requiring certificate holders to allow observers on board is invalid.[2]

IV

One part of the order of the district court requires special attention. We have held that the regulation is invalid. The district judge, however, held the regulation invalid only insofar as it allows observers to gather information for non-scientific purposes. 519 F. Supp. at 580-81. We find no basis in the cases for upholding the use of the observer program for scientific but not for non-scientific purposes, nor has any sound reasoning been asserted in support of such a distinction. The regulation mandates an unauthorized search whether the Secretary intends to use the information he gathers for scientific research or in criminal or civil proceedings. Thus, we hold that the regulation requiring the search is invalid for all purposes. We therefore affirm the district court's judgment in part, reverse in part, and remand for entry of injunctive relief consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

2. Our disposition of the case on these grounds makes it unnecessary to reach the captains' argument that the regulation is inconsistent with section 107 of the Act, 16 U.S.C. § 1377, which authorizes searches with warrants or upon reasonable cause to believe that the vessel or its crew is in violation of the Act. We observe, however, that congressional authorization for the two-year observation program, 16 U.S.C. § 1381(d), which has now expired, was part of the same law as section 107, which was not to expire.

GOODWIN, Circuit Judge, dissenting

Assuming that stationing a government agent on board a tuna boat constitutes a search, *United States v. Raub*, 637 F.2d 1205, 1208 (9th Cir. 1980), I would hold that the search in this case is constitutionally permissible.

In *United States v. Raub*, we held that the need to enforce Indian treaty rights and the pervasive regulation of commercial fishing made the warrantless boarding of fishing vessels in the Puget Sound salmon fishery constitutionally permissible. Tuna fishing, like salmon fishing, is a pervasively regulated industry. This case is like *Raub* because enforcement of the Marine Mammal Protection Act similarly requires boarding and observation of fishing vessels.

The federal government's concern about the destruction of porpoise populations by tuna fishing permeates the statutory scheme of which 16 U.S.C. § 1373 is a part. The overriding purpose of the Marine Mammal Protection Act, 16 U.S.C. §§ 1361-1407, is the protection of marine mammals. *Committee for Humane Legislation, Inc. v. Richardson*, 414 F. Supp. 297, 306-309 (D.C. Cir.), *affirmed*, 540 F.2d 1141 (D.C. Cir. 1976). The majority unnecessarily eliminates the only practicable method of enforcing the statute. Without observers stationed aboard tuna vessels, the government is powerless to enforce the Act, or to collect the scientific data upon which intelligent regulation of the tuna industry's incidental harvest of porpoises must be predicated.

Commercial fishing is not only pervasively regulated,[1] but the very

[1] "Federal regulation of the fishing industry dates back to a 1793 federal license requirement for fishing vessels. Act of Feb. 18, 1793, 1 Stat. 305. . . . *See generally* Northern Pacific Halibut Act of 1937, 50 Stat. 325, 16 U.S.C. §§ 772-772j; Act of Aug. 4, 1949, 38 Stat. 692, 16 U.S.C. §§ 781-786 (sponges from Gulf of Mexico or Straits of Florida); Whaling Convention Act of 1950, 64 Stat. 421, 16 U.S.C. §§ 916-916*l*; Tuna Conventions Act of 1950, 64 Stat. 777, 16 U.S.C. §§ 951-961; Northwest Atlantic Fisheries Act of 1950, 64 Stat. 1067, 16 U.S.C. §§ 981-991; North Pacific Fisheries Act of 1954, 68 Stat. 698, 16 U.S.C. §§ 1021-1032; Offshore Shrimp Fisheries Act of 1973, 87 Stat. 1061, 16 U.S.C. §§ 1100b to 1100b-10; Fishery Conservation Management Act of 1976, 90 Stat. 331, 16 U.S.C. §§ 1801-1882." *United States v. Raub*, 637 F.2d 1205, 1209 n. 5 (9th Cir. 1980).

activity at issue in this case has been the focus of Congressional action. Congress has banned the incidental taking of porpoises by vessels under United States jurisdiction, 16 U.S.C. § 1372, except under permits issued pursuant to 16 U.S.C. § 1374. Section 1374 requires that permits issue only in conformance with regulations promulgated under 16 U.S.C. 1373. "Existing and future levels of marine mammal species and population stocks" 16 U.S.C. § 1373(b)(1), and "the marine ecosystem and related environmental considerations," 16 U.S.C. § 1373(b)(3), must be considered in promulgating the regulations. The regulations may restrict the taking of porpoises by species, number, age, sex or other factors, 16 U.S.C. § 1373(c).

The challenged practice is vital to development of reasonable regulations under § 1373(b) and to enforcement of restrictions promulgated under § 1373(c). Acceptance of observers is a reasonable condition for the issuance of a permit to fish under the restrictions of 16 U.S.C. § 1373.

Without the ability to promulgate sensible regulations under the Act and to enforce those regulations, the Secretary's power to issue permits is in doubt. Without validly issued permits, fishing would be impaired. NOAA observers thus not only protect porpoises, but may help to keep American tuna on the supermarket shelves in a manner consistent with the preservation of the mammals. *See Committee for Humane Legislation v. Richardson*, 540 F.2d 1141 (D.C. Cir. 1976); "[T]he Act was deliberately designed to permit takings of marine mammals only when it was *known* that that taking would not be to the disadvantage of the species." *Id.* at 1150 (Emphasis in original.)

Observation of tuna fishing is necessary for enforcement of the Marine Mammal Protection Act. Authorization is thus clearly implied by the statute. Explicit authority for inspections of other regulated industries has been given by statute, and upheld for the same reason as we would uphold this regulation: that the inspections were necessary to carry out the intent of Congress. *See, e.g., Donovan v. Dewey*, 452 U.S. 594 (1981); *United States v. Biswell*, 406 U.S. 311 (1972); *Colonnade Corp. v. United States*, 397 U.S. 72 (1970). The majority's attempt to distinguish these cases is unconvincing.

Here, as in *Colonnade, Biswell* and *Dewey*, the potential for abuse of warrantless searches is slim because the inspection is limited to a narrowly defined and specialized activity, tuna fishing.

Like the businessmen in *Colonnade*, *Biswell* and *Dewey*, boat operators enter the business of tuna fishing with every expectation that inspection, not freedom from inspection, will be the rule. In fact, the tuna industry argued before Congress that its continued cooperation with the inspection program is one reason why permits to kill porpoises should issue.[2]

To strike down this inspection regulation, necessary to both the protection of porpoises and to the continued vitality of the legislative scheme, upon a concern that "congressional authorization in this case is not clear" seems contrary not only to the clear policy of the statute, but also to our own recent precedent. *United States v. Raub, supra.*

[2] John P. Mulligan, representing the Tuna Research Foundation, Inc., stated:

> "it is imperative that we continue present research activities in order that reliable data is produced and that we be given the necessary time to complete the studies. All of the principal [sic] elements of the porpoise program are just at beginning stages -- those being: gear research and development and its related behavorial studies; life histories -- studies and surveys which include the observer program;. . ." Marine Mammal Protection Act: Hearings before Subcommittee on Fisheries and Wildlife Conservation and the Environment, 93rd Cong., 1st Sess., 72 (1973).

In another hearing later in 1974, the industry again lauded the observer program as an example of its cooperation toward the goal of *de minimis* porpoise mortality, and appended to its testimony a summary of observer cruises conducted to that date. Marine Mammal Protection Act: Hearings on H.R. 15273, H.R. 15459, H.R. 15810, H.R. 15967, H.R. 16043, H.R. 16777, before Subcomm. on Fisheries and Wildlife Conservation and the Environment, 93rd Cong., 2d. Sess. 195, 207-211 (1974).

John R. BALELO, Andrew Castagnola, Leo Correia, Manuel S. Jorge, Bryan R. Madruga, Harold Medina, John A. Silva, Ralph F. Silva, Jr., George Sousa, Manuel S. Vargas, Jr., John B. Zolezzi, Jr., Plaintiffs,

v.

Philip M. KLUTZNICK, Secretary of Commerce of the U. S., Richard A. Frank, Administrator, National Oceanic and Atmospheric Administration and Terry Leitzell, Assistant Administrator for Fisheries, National Marine Fisheries Service, Defendants.

Environmental Defense Fund, Inc., and Defenders of Wildlife, Intervenor-Defendants.

No. 80-1646-GT(H).

United States District Court,
S. D. California.

July 24, 1981.

MEMORANDUM DECISION AND ORDER

GORDON THOMPSON, Jr., District Judge.

The case at bar concerns the statutory and constitutional validity of the federal observer program on U. S. tuna vessels which fish in association with porpoise. The issue is whether data gathered by these mandatory on-board observers may be used against the vessel and crew in civil, criminal and forfeiture proceedings. The material facts are not in dispute and the case comes before the Court on cross-motions for summary judgment.

A bit of background concerning tuna purse-seining and the Marine Mammal Protection Act is appropriate. Tuna, especially yellowfin, tend to swim in association with porpoise, which are marine mammals. Capitalizing on this known, but scientifically unexplained phenomenon, tuna purse-seiners often set their nets around schools of porpoise in order to encircle the tuna swimming beneath. In the process of pursing the net, some porpoise may become entrapped and be drowned or injured.

Over the years, the fishermen have developed techniques and gear designed to minimize porpoise mortality and injury, such as smaller mesh nets, escape panels, and a back-down maneuver which causes part of the net to submerge, allowing the porpoise to swim free. Since 1972, porpoise mortality has declined from approximately 300,000 to approximately 18,500 in 1979, based upon figures extrapolated from observed vessels.

In 1972, Congress enacted the Marine Mammal Protection Act, 16 U.S.C. § 1361, *et seq.*, which imposed a moratorium on the taking of marine mammals, but excepted the commercial fishing industry during a two-year period of research and development. Thereafter, the incidental taking of marine mammals in connection with commercial fishing could be allowed by the Secretary of Commerce subject to regulations and permits. 16 U.S.C. §§ 1371, 1374. The Secretary has issued a comprehensive set of regulations, 50 C.F.R. § 216, *et seq.*, which cover nearly all aspects of tuna fishing "on porpoise," from prohibition of setting on certain species of porpoise, to net and maneuvering requirements, to minutiae such as the condition of speedboats, scuba gear and face masks. The penalties provided by the Act for violation of these regulations are severe, ranging from civil penalties of $10,000.00 for each violation, to criminal penalties of one-year imprisonment and/or $20,000.00 fine, to forfeiture of the catch (which may have a value in excess of one million dollars). 16 U.S.C. §§ 1375, 1376.

The case centers about one of the regulations adopted by the Secretary of Commerce, 50 C.F.R. § 216.24(f), which in its present form (effective January 1, 1981) reads in pertinent part:

> "(f) *Observers* . . . (1) The vessel certificate holder of any certified vessel shall, upon the proper notification by the National Marine Fisheries Service, allow an observer duly authorized by the Secretary to accompany the vessel on any or all regular fishing trips for the purpose of conducting research and observing operations, *including collecting information which may be used in civil and criminal penalty proceedings, forfeiture actions, or permit or certificate sanctions.*" [Emphasis added.]

Under this regulation, the National Marine Fisheries Service (NMFS"), a division of the National Oceanographic and Atmospheric Administration, stations federal observers, denominated "biological technicians," aboard tuna vessels for the duration of a fishing trip, which often lasts two to three months and ranges thousands of miles into

the ocean. The observer berths with the crew in the ship's galley (at government expense). During all fishing operations, the observer positions himself on deck and methodically records in numerous log books and forms detailed information regarding porpoise stocks and species, and the compliance of the vessel with the regulations. As part of his duties under the Field Manual issued by NMFS, the observer questions captain and crew regarding their estimates of porpoise. This data is then turned over to the enforcement branch of NMFS, which issues notices of violations against the vessel and crew. Such notices based upon observer-gathered data have been issued and administrative proceedings instituted, commencing in August 1977 under predecessor regulations. Unless restrained, the Secretary indicates he will continue so to use the observer data.

Plaintiff tunaboat captains contend that the observer program as implemented by the regulation is in violation of the statute and of the Fourth Amendment of the Constitution. Defendants contend that it is a valid, and the only practical, method of enforcing compliance with the Act. The starting point for analysis is whether the stationing of the observer on the vessel constitutes a "search" within the meaning of the Fourth Amendment.

[1] Recent decisions of the Ninth Circuit have made it clear that the mere boarding of a vessel, commercial or private, by government agents for any type of investigation or inspection is a search within the Fourth Amendment. This was the specific holding of *United States v. Raub*, 637 F.2d 1205 (9th Cir. 1980), which involved the boarding of a fishing vessel by an NMFS agent to check the owner's Indian identification card. Also, in *United States v. Piner*, 608 F.2d 358 (9th Cir. 1979), the boarding of a pleasure craft in San Francisco Bay for routine safety and document check was held to be a search. Since under the observer program there is boarding by government agents who have, as one of their express purposes, the gathering of information for use in civil, criminal or forfeiture proceedings against the vessel or crew, their entry and presence on board must be deemed a search.

[2, 3] Arguments advanced by Defendants and Intervenors that this is not a search under the "plain view," "open fields," or "public view" doctrines are inapposite. As the Surpeme Court made clear in *Coolidge v. New Hampshire*, 403 U.S. 443, 464-473, 91 S.Ct. 2022, 2037-2042, 29 L.Ed.2d 564 (1971), "plain view" applies only where the initial intrusion is justified and the observation inadvertent or fortuitous. Here, the

observation is not inadvertent, but specifically intended. The "open fields" doctrine regards technical trespasses or insignificant intrusions onto the open exterior areas of private property as "de minimis" and immaterial to the validity of observatins made as a result of such intrusions. Here the intrusion is not insignificant or "abstract and theoretical," but substantial. "Public view" applies where law enforcement makes observations in the same fashion as members of the public. As the Supreme Court indicated in *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 329, 99 S.Ct. 2319, 2326, 60 L.Ed.2d 920 (1979), the law enforcement officer must truly be positioned and act as a member of the public, and not assume prerogatives and vantage points not accorded to the pubilc. Here, since members of the public are not permitted aboard tuna vessels at sea, the observer has a private vantage point carved out specially for observers by the regulation and not available to the public.

Thus, the various "view" doctrines are inapposite since the initial boarding of the vessel which gives the observer his continuous viewing platform is itself a search within the Fourth Amendment. The issue then is the authority for the search.

[4] It is axiomatic that an administrator is a creature of statute and that his authority derives solely from the statute pursuant to which he acts. *Soriano v. United States*, 494 F.2d 681, 683 (9th Cir. 1974); *Manhattan General Equipment Co. v. Commissioner*, 297 U.S. 129, 56 S.Ct. 397, 80 L.Ed. 528 (1936). We turn then to the statute to ascertain the Secretary's authority to adopt the search regulation.

Congress did, in enacting the Marine Mammal Protection Act, provide specifically for a type of observer program. In § 1381, the Congress established a two-year period of research and development of new fishing techniques and gear to minimize porpoise mortality and injury and an observer program for research related thereto. It is obvious from that section, however, that the sole function of the observers was research and development, and that they had no enforcement role. In any event, that express statutory authorization expired by its own terms on October 21, 1974, and Defendants do not, nor could they, seek to base the Secretary's authority on that section.

[5] In § 1377 of the Act, entitled "Enforcement," Congress expressly conferred authority for searches pursuant to the Act and set the standard for such searches. That section empowered enforcement officers to:

"(2) with a warrant or other process, or *without a warrant if he has reasonable cause* to believe that a vessel or other conveyance subject to the jurisdiction of the United States or any person on board is in violation of any provision of this subchapter or the regulations issued thereunder, *search such vessel*, or conveyance and arrest such person." [Emphasis added.]

Thus, it is clear that Congress authorized warrantless searches under the Act, but only if there exists reasonable cause to believe that the vessel or a person on board is in violation of the Act or regulations.

In the context of search, arrest and forfeiture, the terms "reasonable cause" and "probable cause" have traditionally been used interchangeably. *Stacey v. Emery*, 97 U.S. 642, 645, 24 L.Ed. 1035 (1878); *United States v. 83 Sacks of Wool, Etc.*, 147 F. 747, 748 (D.Me.1906); *Schnorenberg v. United States*, 23 F.2d 38, 39 (7th Cir. 1927); *Levine v. United States*, 138 F.2d 627 (2nd Cir. 1943); *United States v. Fay*, 240 F.Supp. 591, 594 (S.D.N.Y.1965), *cert. denied*, 384 U.S. 964, 86 S.Ct. 1592, 16 L.Ed.2d 675 (1966).

Defendants admit that the placement of observers on tuna vessels is without a warrant and without specific probable cause to believe that the vessel or any person on board is in violation of the Act or regulations. Since the regulation purports to authorize searches of tuna vessels without a warrant and without reasonable cause to believe the vessel or a person on board is in violation of the Act or regulations, it is in direct contravention of § 1377 of the Act, which requires reasonable cause. A regulation which contravenes its enabling statute is void. As the Supreme Court held in striking down a regulation in *Manhattan General Equipment Co. v. Commissioner*, 297 U.S. 129, 56 S.Ct. 397, 80 L.Ed. 528 (1936):

"The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law—for no such power can be delegated by Congress, but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute is a mere nullity." 297 U.S. at 134, 56 S.Ct. at 400.

Defendants and Intervenors seek to avoid this clash between the express terms of the statute and the regulation. Defendants point to the fact that § 1377 applies to "enforcement officers," and that under the

NMFS Field Manual (1981) observers are not enforcement officers. The mere fact that the observer may not be endowed with arrest authority does not mean he performs no enforcement function. His gathering of data for use in civil and criminal proceedings is an important investigative part of the enforcement function. The fact that it is some other branch of the NMFS which converts the data into notices of violation or charges does not immunize the observer's role from the reach of § 1377. If an officer endowed with full enforcement authority is required under § 1377 to have reasonable cause for a warrantless search, one endowed with only partial enforcement authority can claim no superior position.

Intervenor points to the fact that § 1377 applies to all vessels subject to United States jurisdiction under the Act, whether they fish on porpoise or not. This is true, but provides no basis for excepting vessels which do fish on porpoise from the blanket provisions of § 1377, which, by their terms, apply to the entire Act and admit of no exception.

The regulation flies squarely in the face of § 1377 of the Marine Mammal Protection Act and is void.

Defendants and Intervenors lay heavy stress on the contention that the observer program is the only practical means of monitoring compliance with the Act, and that the use of aircraft or vessels for surveillance would be cost-inefficient and result in spotty oversight. On the basis of expediency and the broad powers conferred upon the Secretary to adopt regulations he deems "necessary and appropriate," they urge the Court to find in the Act implied authority for the Secretary's regulation. Of course, such authority cannot be implied if it contravenes the express language of the statute.

Assuming arguendo that § 1377 did not act as a bar to such an implication of authority, there are other reasons why that power cannot be implied. The Court cannot imply the authority in an administrator to define and delineate the scope of his own search authority. As pointed out by the Supreme Court in *United States v. United States District Court*, 407 U.S. 297, 316, 92 S.Ct. 2125, 2136, 32 L.Ed.2d 752 (1972), the executive officer is not a neutral and detached magistrate, but the enforcer of the law.

> "But those charged with this investigation and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks."

[6] It follows that the Court should not imply authority in the administrator to determine whether he may search without a warrant and without probable cause.

Finally, Defendants argue that an agency interpretation of its enabling statute is entitled to great weight and that Congress has ratified that interpretation by failure to object and by renewing appropriations under the Act. The Supreme Court has indicated in *Zuber v. Allen*, 396 U.S. 168, 192, 90 S.Ct. 314, 327, 24 L.Ed.2d 345 (1969), and *S.E.C. v. Sloan*, 436 U.S. 103, 120, 98 S.Ct. 1702, 1713, 56 L.Ed.2d 148 (1978), that an agency interpretation is but one ingredient of the interpretational equation, and that it has greatest weight when the agency participated in drafting the statute and made its interpretation known to Congress at that time. Here there is no contention that the agency interpretation was made known to Congress at the time the statute was adopted in 1972. In fact, the first time the agency issued notices of violations based upon observer data was in August 1977, long after the passage of the Act. In *S.E.C. v. Sloan*, 436 U.S. 103, 120, 98 S.Ct. 1702, 1713, 56 L.Ed.2d 148 (1978), the Supreme Court struck down an agency practice of 34 years' standing even though the Senate committee charged with the oversight of the S.E.C. knew of and specifically endorsed the practice. Also, in *Zuber v. Allen*, 396 U.S. 168, 193, 90 S.Ct. 314, 328, 24 L.Ed.2d 345 (1969), the Court invalidated an agency interpretation of many years' duration despite an intervening re-enactment. *See, also, TVA v. Hill*, 437 U.S. 153, 193, 98 S.Ct. 2279, 2301, 57 L.Ed.2d 117 (1978).

The Court is impressed, too, with the fact that in 1977 the Secretary proposed an amendment to the Act which would have made explicit his authority to use observer data for enforcement purposes. The amendment, while approved by the House, was never taken up by the Senate. See, Hearings before the Committee on Merchant Marine and Fisheries, House of Representatives, 95th Congress, First Session, May 1977, Serial No. 95-3, pp. 35, 109. The post-enactment legislative history does not support the contention that Congress "ratified" the Secretary's interpretation of the Act.

[7] In any event, there is a superseding principle which operates here, making implied authority and ratification irrelevant. A considerable body of case law holds that where agency action affects substantial constitutional rights, or is of questionable constitutionality, an explicit congressional authorization is required rather than implication or acquiescence. *See, e.g., Greene v. McElroy*, 360 U.S. 474, 79 S.Ct. 1400, 3

L.Ed.2d 1377 (1959); *Kent v. Dulles*, 357 U.S. 116, 131, 78 S.Ct. 1113, 1121, 2 L.Ed.2d 1204 (1958); *Schneider v. Smith*, 390 U.S. 17, 26, 88 S.Ct. 682, 687, 19 L.Ed.2d 799 (1968); *see, also, S.E.C. v. Sloan*, 436 U.S. 103, 112, 98 S.Ct. 1702, 1708, 56 L.Ed.2d 148 (1978). As the Supreme Court stated in *Greene v. McElroy*:

> "If acquiescence or implied ratification were enough to show delegation of authority to take actions within the area of questionable constitutionality, we might agree with respondents that delegation has been shown here . . . Such decisions cannot be assumed by acquiescence or non-action. [Citations omitted.] They must be made explicitly not only to assure that individuals are not deprived of cherished rights under procedures not actually authorized, . . ., but also because explicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws. Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them." 360 U.S. at 506, 507, 79 S.Ct. at 1418, 1419.

For all of these reasons the Court is persuaded that the Secretary has neither express nor implied authority to adopt the regulation, and it is void.

The very facts which render the regulation invalid under the statute also render it a violation of the Fourth Amendment.

[8, 9] A warrantless search is per se unreasonable unless it falls within one of the recognized narrow exceptions to the warrant requirement. *Camara v. Municipal Court*, 387 U.S. 523, 528-29, 87 S.Ct. 1727, 1730-31, 18 L.Ed.2d 930 (1967); *See v. City of Seattle*, 387 U.S. 541, 543, 87 S.Ct. 1737, 1739, 18 L.Ed.2d 943 (1967); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312, 98 S.Ct. 1816, 1820, 56 L.Ed.2d 305 (1978); *Michigan v. Tyler*, 436 U.S. 499, 509, 98 S.Ct. 1942, 1949, 56 L.Ed.2d 486 (1978). The only exception urged by Defendants is the "pervasively regulated industry" exception carved out and elaborated upon by the Supreme Court in three cases: *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 90 S.Ct. 774, 25 L.Ed.2d 60 (1970); *United States v. Biswell*, 406 U.S. 311, 92 S.Ct. 1593, 32 L.Ed.2d 87 (1972); and *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978).

Careful analysis of these cases, as well as lower court decisions following in their wake, indicates that the minimum requirements of the exception are (1) an industry which has been subject to historical or pervasive federal regulation such that warrantless inspection is both necessary and to be anticipated, and (2) a statute explicitly authorizing the warrantless inspection. As the Court states in *Biswell*:

> "In the context of a regulatory inspection system of business premises that is carefully limited in time, place and scope, the legality of the search depends not on consent but on the authority of a valid statute." 406 U.S. at 315, 92 S.Ct. at 1596.

The parties have cited, and the Court is aware of, no case which has upheld a warrantless regulatory administrative inspection in the absence of an express statutory authorization for such inspection. The rationale for this requirement of an express statute is undoubtedly to be found in the statement previously quoted from *United States v. United States District Court*, 407 U.S. 297, 316, 92 S.Ct. 2125, 2136, 32 L.Ed.2d 752 (1972), regarding the traditional role of the detached and impartial magistrate in the issuance of a warrant, i. e., the magistrate assures that there is probable cause for the search and that the scope of the search is appropriately limited in time, place and scope. As the Court points out, an administrator cannot fulfill these traditional functions of the magistrate since he, himself, is the searcher. Congress, however, being elected by and responsive to the people, and presumably sensitive to their constitutional rights, comes closer to fulfilling the role of the magistrate than any administrator can. Accordingly, a properly drawn statute in appropriate cases may substitute for the warrant. *See, United States v. Cooper*, 409 F.Supp. 364, 368 (M.D., Fla.1976), *aff'd.*, 542 F.2d 1171 (5th Cir. 1976). While the courts remain the ultimate arbiters of the reasonableness of a search even where authorized by Congress, *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978); *United States v. Piner*, 608 F.2d 358 (9th Cir. 1979); *United States v. Taylor*, 488 F.Supp. 475 (D.Or.1980), on the whole, deference has been shown to the congressional determination of the standard of reasonableness. *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 90 S.Ct. 774, 25 L.Ed.2d 60 (1970).

[10] Viewing the regulation in the light of these principles, the Court finds that, insofar as it purports to allow a warrantless search without reasonable cause, it is not expressly authorized by the statute. Accordingly, the "pervasively regulated industry" exception to the warrant

requirement is inapplicable, and the search is therefore in violation of the Fourth Amendment.

[11, 12] The Defendants and Intervenors, finally, seek to justify the regulation as within the broad authority of the Secretary under § 1374 to issue permits authorizing the incidental taking of mammals with "any other terms or conditions which the Secretary deems appropriate." The argument is that since the Secretary may prohibit fishing on porpoise altogether, he may permit it subject to the condition of compliance with the regulation. But, inasmuch as the regulation is invalid under the statute and the Constitution, the Secretary certainly may not condition the grant of a permit upon compliance with an invalid regulation. This would permit him to do indirectly what he cannot do directly. Also, a long line of respectable authority stands for the proposition that the government may not condition a privilege (especially to pursue one's livelihood) upon compliance with an unconstitutional requirement. *Frost v. Railroad Commission*, 271 U.S. 583, 593, 46 S.Ct. 605, 607, 70 L.Ed. 1101 (1926); *United States v. Chicago Milwaukee, Etc. R. R.*, 282 U.S. 311, 328, 51 S.Ct. 159, 163, 75 L.Ed. 359 (1931); *Standard Airlines v. Civil Aeronautics Board*, 177 F.2d 18 (D.C.Cir.1949); *Smyth v. Lubbers*, 398 F.Supp. 777 (W.D. Mich.1975).

The Court therefore concludes that the regulation contravenes both the Marine Mammal Protection Act and the Fourth Amendment of the Constitution and is invalid. If indeed the Secretary believes he has not been given the tools to carry out his assigned responsibilities, the appropriate remedy is to petition Congress, and not to ask the Court to rewrite the language of the statute or the Constitution. *See, e. g., TVA v. Hill*, 437 U.S. 153, 195-195, 98 S.Ct. 2279, 2301-2302, 57 L.Ed.2d 117 (1978). The protection of marine mammals from careless depredation is an important societal value as manifested by the Marine Mammal Protection Act, but it cannot be furthered by the violation of the Fourth Amendment rights of fishermen. The observer program as implemented by the regulation is an extraordinarily intrusive invasion of privacy, entailing the compelled 24-hour a day presence of government agents on Plaintiffs' vessels for two to three months at a time. Whether Congress could constitutionally impose such a program on tuna vessels under the Act is not before the Court, and no opinion on that subject is expressed here. If such a constitutionally sensitive program is to be adopted, however, that choice must be clearly made and declared by Congress, and not by the administrator.

ORDER

The Court declares:

1. That the regulation, 50 C.F.R. 216.24(f), insofar as it allows observers to gather data and information for use in civil or criminal penalty proceedings, forfeiture actions, or permit or certificate sanctions is invalid and void.

2. The Court permanently enjoins Defendants, their successors, agents, employees and anyone acting on their behalf from using observer-gathered data or information under the regulation, or its fruits, for civil or criminal penalty proceedings, forfeiture actions, permits or certificate sanctions, or for any purpose except scientific research.

3. The Court permanently enjoins Defendants their successors, agents, employees and anyone acting on their behalf from requiring Plaintiffs, as a condition to the granting of permits or certificates of inclusion to fish for tuna in association with porpoise, to accept the on-board presence of observers whose information or data may be used for any purpose except scientific research.

JUDGMENT

United States Court of Appeals
FOR THE NINTH CIRCUIT

JOHN R. BALELO, ANDREW CASTAGNOLA, LEO CORREIA, MANUEL S. JORGE, BRYAN R. MADRUGA, et al.,

Plaintiffs-Appellees,

v.

MALCOLM BALDRIGE, Secretary of Commerce of the United States, et al.,
Defendants-Appellants,
ENVIRONMENTAL DEFENSE FUND, INC., et al.,
Intervenor-Defendants-Appellants.

Nos. 81-5806 & 81-5807

DC# CV 80-1646-GT

APPEAL from the United States District Court for the SOUTHERN District of CALIFORNIA

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the SOUTHERN District of CALIFORNIA and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is REVERSED & REMANDED.

Filed and entered JANUARY 24, 1984

UNITED STATES CONSTITUTION, FOURTH AMENDMENT

Art. IV. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

UNITED STATES CODE, TITLE 16

§ 1377. Enforcement

(a) Utilization of personnel

Except as otherwise provided in this subchapter, the Secretary shall enforce the provisions of this subchapter. The Secretary may utilize, by agreement, the personnel, services, and facilities of any other Federal agency for purposes of enforcing this subchapter.

(b) State officers and employees

The Secretary may also designate officers and employees of any State or of any possession of the United States to enforce the provisions of this subchapter. When so designated, such officers and employees are authorized to function as Federal law enforcement agents for these purposes, but they shall not be held and considered as employees of the United States for the purposes of any laws administered by the Director of the Office of Personnel Management.

(c) Warrants and other process for enforcement

The judges of the district courts of the United States and the United States magistrates may, within their respective jurisdictions, upon proper oath or affirmation showing probable cause, issue such warrants or other process, including warrants or other process issued in admiralty proceedings in United States district courts, as may be required for enforcement of this subchapter and any regulations issued thereunder.

(d) Execution of process; arrest; search; seizure

Any person authorized by the Secretary to enforce this subchapter may execute any warrant or process issued by any officer or court of competent jurisdiction for the enforcement of this subchapter. Such a person so authorized may, in addition to any other authority conferred by law—

(1) with or without warrant or other process, arrest any person committing in his presence or view a violation of this subchapter or the regulations issued thereunder;

(2) with a warrant or other process, or without a warrant if he has reasonable cause to believe that a vessel or other conveyance subject to the jurisdiction of the United States or any person on board is in violation of any provision of this subchapter or the regulations issued thereunder, search such vessel or conveyance and arrest such person;

(3) seize the cargo of any vessel or other conveyance subject to the jurisdiction of the United States used or employed contrary to the provisions of this subchapter or the regulations issued hereunder or which reasonably appears to have been so used or employed; and

(4) seize, whenever and wherever found, all marine mammals and marine mammals products taken or retained in violation of this subchapter or the regulations issued thereunder and shall dispose of them, in accordance with regulations prescribed by the Secretary.

(e) Disposition of seized cargo

(1) Whenever any cargo or marine mammal or marine mammal product is seized pursuant to this section, the Secretary shall expedite any proceedings commenced under section 1375(a) or (b) of this title. All marine mammal or marine mammal products or other cargo so seized shall be held by any person authorized by the Secretary pending disposition of such proceedings. The owner or consignee of any such marine mammal or marine mammal product or other cargo so seized shall, as soon as practicable following such seizure, be notified of that fact in accordance with regulations established by the Secretary.

(2) The Secretary may, with respect to any proceeding under section 1375(a) or (b) of this title, in lieu of holding any marine mammal or marine mammal product or other cargo, permit the person concerned to post bond or other surety satisfactory to the Secretary pending the disposition of such proceeding.

(3)(A) Upon the assessment of a penalty pursuant to section 1375(a) of this title, all marine mammals and marine mammal products or other cargo seized in connection therewith may be proceeded against in any

court of competent jurisdiction and forfeited to the Secretary for disposition by him in such manner as he deems appropriate.

(B) Upon conviction for violation of section 1375(b) of this title, all marine mammals and marine mammal products seized in connection therewith shall be forfeited to the Secretary for disposition by him in such manner as he deems appropriate. Any other property or item so seized may, at the discretion of the court, be forfeited to the United States or otherwise disposed of.

(4) If with respect to any marine mammal or marine mammal product or other cargo so seized—

(A) a civil penalty is assessed under section 1375(a) of this title and no judicial action is commenced to obtain the forfeiture of such mammal or product within thirty days after such assessment, such marine mammal or marine mammal product or other cargo shall be immediately returned to the owner or the consignee; or

(B) no conviction results from an alleged violation of section 1375(b) of this title, such marine mammal or marine mammal product or other cargo shall immediately be returned to the owner or consignee if the Secretary does not, with[1] thirty days after the final disposition of the case involving such alleged violation, commence proceedings for the assessment of a civil penalty under section 1375(a) of this title.

§ 1381. Commercial fisheries gear development

(a) Research and development program; report to Congress; authorization of appropriations

The Secretary of the department in which the National Oceanic and Atmospheric Administration is operating (hereafter referred to in this section as the "Secretary") is hereby authorized and directed to immediately undertake a program of research and development for the purpose of devising improved fishing methods and gear so as to reduce to the maximum extent practicable the incidental taking of marine mammals in connection with commercial fishing. At the end of the full twenty-four calendar month period following October 21, 1972, the Secretary shall deliver his report in writing to the Congress with respect to the results of such research and development. For the purposes of this section, there is hereby authorized to be appropriated the sum of $1,000,000 for the fiscal

[1]So in original. Probably should be "within".

year ending June 30, 1973, and the same amount for the next fiscal year. Funds appropriated for this section shall remain available until expended.

(b) Reduction of level of taking of marine mammals incidental to commercial fishing operations

The Secretary, after consultation with the Marine Mammal Commission, is authorized and directed to issue, as soon as practicable, such regulations, covering the twenty-four-month period referred to in section 1371(a)(2) of this title, as he deems necessary or advisable, ot reduce to the lowest practicable level the taking of marine mammals incidental to commercial fishing operations. Such regulations shall be adopted pursuant to section 553 of title 5. In issuing such regulations, the Secretary shall take into account the results of any scientific research under subsection (a) of this section and, in each case, shall provide a reasonable time not exceeding four months for the persons affected to implement such regulations.

(c) Reduction of level of taking of marine mammals in tuna fishery

Additionally, the Secretary and Secretary of State are directed to commence negotiations within the Inter-American Tropical Tuna Commission in order to effect essential compliance with the regulatory provisions of this chapter so as to reduce to the maximum extent feasible the incidental taking of marine mammals by vessels involved in the tuna fishery. The Secretary and Secretary of State are further directed to request the Director of Investigations of the Inter-American Tropical Tuna Commission to make recommendations to all member nations of the Commission as soon as is practicable as to the utilization of methods and gear devised under subsection (a) of this section.

(d) Research and observation

Furthermore, after timely notice and during the period of research provided in this section, duly authorized agents of the Secretary are hereby empowered to board and to accompany any commercial fishing vessel documented under the laws of the United States, there being space available, on a regular fishing trip for the purpose of conducting research or observing operations in regard to the development of improved fishing methods and gear as authorized by this section. Such research and observation shall be carried out in such manner as to minimize interference

with fishing operations. The Secretary shall provide for the cost of quartering and maintaining such agents. No master, operator, or owner of such a vessel shall impair or in any way interfere with the research or observation being carried out by agents of the Secretary pursuant to this section.

50 C.F.R. § 216.24(f)

(f) *Observers*—(1) The vessel certificate holder of any certificated vessel shall, upon the proper notification by the National Marine Fisheries Service, allow an observer duly authorized by the Secretary to accompany the vessel on any or all regular fishing trips for the purpose of conducting research and observing operations, including collecting information which may be used in civil or criminal penalty proceedings, forfeiture actions, or permit or certificate sanctions.

(2) Research and observation duties shall be carried out in such a manner as to minimize interference with commercial fishing operations. The navigator shall provide true vessel locations by latitude and longitude, accurate to the nearest minute, upon request by the observer. No owner, master, operator, or crew member of a certificated vessel shall impair or in any way interfere with the research or observations being carried out.

(3) Marine mammals killed during fishing operations which are accessible to crewmen and requested from the certificate holder or master by the observer shall be brought aboard the vessel and retained for biological processing, until released by the observer for return to the ocean. Whole marine mammals designated as biological specimens by the observer shall be retained in cold storage aboard the vessel until retrieved by authorized personnel of the National Marine Fisheries Service when the vessel returns to port for unloading.

(4) The Secretary shall provide for the payment of all reasonable costs directly related to the quartering and maintaining of such observers on board such vessels. A vessel certificate holder who has been notified that the vessel is required to carry an observer, via certified letter from the National Marine Fisheries Service, shall notify the office from which the letter was received at least five days in advance of the fishing voyage to facilitate observer placement. A vessel certificate holder who has failed to comply with the provisions of this section may not engage in fishing operations for which a general permit is required.

(5) It is unlawful for any person to forcibly assault, impede, intimidate, interfere with, influence or attempt to influence an observer placed aboard a vessel.